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IN THE

Supreme Court of the United States

October Term, 1968

No. 234

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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No. .....

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Tonkin Corporation of California, dba Seven-Up Bottling Company of Sacramento, petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above-entitled cause on 29 March, 1968.

Opinions Below.

The original Decision and Order (hereinafter referred to as the "Original Order") of the National Labor Relations Board (hereinafter referred to as the "Board") in this cause is reported as 147 NLRB No. 48.

The first opinion in this cause, then No. 19714, Mathes, Senior District Judge, enforcing that Original

Order in part and remanding in part to the Board for reconsideration, is reported as 352 F. 2d 509 (9th Cir. 1965).

Pursuant to the direction of the Court of Appeals on remand, the Board, on 27 May, 1966, issued its Supplemental Decision and Order (hereinafter referred to as "Supplemental Order") reported as 158 NLRB No. 110.

The Opinion of the United States Court of Appeals for the 9th Circuit (hereinafter referred to as "Opinion"), on review of the Supplemental Order, denying the Petition for Review and granting the Board's Cross-Petition for Enforcement is reported as 392 F. 2d 141 (9th Cir. 1968), and is printed and attached hereto as Appendix "A".

Grounds for Jurisdiction.

Petitioners, in the Court of Appeals, sought review of the Supplemental Order in the cause, now numbered 21130. The Board cross-petitioned for its enforcement. The Court had jurisdiction pursuant to the National Labor Relations Act, Section 10(e) and (f) as amended 29 U.S.C.A. Sec. 160(e) and (f), (hereinafter referred to as the "Act").

The Court denied the Petition for Review and granted the Cross-Petition for enforcement, erroneously, we submit.

The Opinion of the Court of Appeals is dated 29 March, 1968, and was filed and entered the same date; Petitioner requested a rehearing 26 April, 1968, which was denied by the Court 14 May, 1968.

Petitioner urges that the Opinion decides an important question of federal law which has not been,

but should be, settled by this Court; decides a federal question in a way which conflicts with applicable decisions of this Court; and decides a question in conflict with the decisions of other Courts of Appeals on the same point.

Therefore, pursuant to 28 USCA § 1254, and U.S. Sup. Ct. Rule 19, 28 USCA, petition is made to this Court for a Writ of Certiorari to review the Opinion below.

Pursuant to application, the Court of Appeals granted a thirty (30) day Stay of Mandate on 20 May, 1968; this was extended for a further thirty (30) days pursuant to order made on 13 June, 1968.

No order has been sought or granted for an extension of time in which to petition for certiorari.

Questions Presented.

Five questions of major importance to labor management relationships are ultimately involved in the instant cause:

1. Is it an unfair labor practice for an employer to express a preference for continued dealing with the longtime representative of its employees for collective bargaining purposes where the employer is under the erroneous impression that a rival union is desirous of supplanting the incumbent union (herein referred to as "Incumbent") but where no question of representation is or has been presented?

2. Under the foregoing circumstances, is it an unfair labor practice for the employer to pursue negotiations with the Incumbent and to bargain to agreement, even though the employer may be motivated in part by a wish to preserve the continuity and stability of the

historic bargaining relationship through the instrumentality of the agreement sought (and actually achieved)?

3. Under the foregoing circumstances, may the officers of the Incumbent, having bargained to agreement with the employer, *subsequently,* with impunity, seek to frustrate that agreement and to subvert the bargaining process by proselytizing their own membership on behalf of a rival union, in violation of their duty to bargain in good faith and of the fiduciary duties imposed by 29 USCA § 501 (a), (b) and, in so doing, cast upon the employer the onus of resisting this conduct and defending the agreement at its peril?

4. Having bargained to agreement under the foregoing circumstances, may an employer, under *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965) (hereinafter referred to as *American Ship*) lawfully utilize the lockout in support of its position in insisting that the Incumbent honor the agreement previously reached and execute a written contract embodying that agreement?

5. Or, on the other hand, is an employer, in order to preclude unfair labor practice charges in such circumstances, obliged to suspend negotiations, abrogate the agreement concluded, and withdraw recognition of the Incumbent upon hearing that a rival union is actively proselytizing its employees, but where no question of representation, demand for recognition, nor any claim of majority status whatever has been presented?

Statutes Involved.

The statutes involved in the cause herein are the Labor Management Relations Act §§ 1(a); 7; 8(a)(1), (2), (3); 8(b)(3), (c), (d); 10(e), (f), as amended

29 U.S.C.A. §§151(a); 157; 158(a)(1), (2), (3); 158(b)(3); 158(c); 158(d); 160(e); 160(f); and the Landrum-Griffin Act, §§501(a) and (b), 29 U.S.C.A. §§ 501(a) and (b). The statutes in pertinent part are printed verbatim and are attached hereto as Appendix "B".

Statement of the Case.

This is an action arising from charges filed with the Board claiming that Petitioner had committed violations of § 8 (a), (1), (2), (3) and (5) of the Act. The court below had jurisdiction by virtue of § 10(e) and (f) of the Act.

Petitioner is engaged in the business of bottling and distributing soft drink products, including 7-Up, in the Sacramento area. The Seven-Up Employees' Union (hereinafter referred to as the "Incumbent") had been the bargaining representative for many years for Petitioner's plant employees and route salesmen [Opinion, p. 1].[1]

At the time of the events in question, a contract was in existence between Petitioner and the Incumbent which was to expire 31 March, 1963 [Tr. 410-412; 414; 420].

Early in 1963, the members of the Incumbent began considering terms they wished to have incorporated into the new contract and submitted a series of demands to the employer [Op. p. 2; Tr. 13; 49-50]. The parties met in negotiations several times over several weeks without reaching agreement [Resp. Br. p. 3; Tr.

[1]References to the Opinion will be indicated herein by "Op."; Opinion page references shall be to pages in Appendix A; references to the transcript of record, by "Tr."; "Pet. Br." will indicate Petitioner's opening brief below; "Resp. Br." will indicate Respondent's brief below.

13-18; 87-88; 245-253; 293-294]. On 27 March, four days before the existing contract was to expire, the employees rejected the Petitioner's most recent offer [Tr. 15-18]. A meeting was called by Petitioner for Friday, 29 March, 1963, to explain its position [Op. p. 2].

Petitioner's president, Harry Tonkin, made several proposals, including a wage increase, overtime pay, and an offer to match any increase in wages paid by other local soft-drink companies, in what amounted to a "most favored nation" clause [Op. p. 2; Tr. 255-6; 295-6]. Other matters relating to proposed terms of the contract were discussed [Op. p. 2; Tr. 21-2; 255-8; 295-6]. Tonkin agreed to reconsider the basis for recomputing the route salesmen's bonus and to discuss further the matter of holidays and sick leave [Op. p. 2; Tr. 255-60; 295-6].

Tonkin stated that he had heard rumors of Teamster organizational activities among his employees (Actually, Tonkin was in error in his statement, since it is undisputed that the first contact had by the employees with the Teamsters was on the following Sunday, 31 March) [Op. p. 2;[2] Tr. 26-7]. He pointed out some of the benefits of independent union membership and mentioned certain disadvantages of Teamster affiliation [Tr. 21; 161; 271-3; 295-6]. He stated that he intended to deal within the framework of the existing collective bargainting relationship and continue negotiating with the Incumbent, and that he wished to have a

[2]The opinion of the Court in the orignal case, *NLRB v. Tonkin Corporation, etc.*, was, therefore, mistaken when it declared: "The record also discloses evidence of side-line proselytizing efforts on the part of the Teamsters' Union, which were intimately interlaced with . . . the earlier company—union contract negotiations." (352 F. 2d 509, 510-11).

contract before the men went to work Monday [Tr. 59-60; 257-8].

The meeting was adjourned, the Tonkins withdrew, and the members discussed the Petitioner's proposals. There was a general consensus to accept the proposals in view of the overtime and "most favored nation" terms [Op. p. 3].

Since Harry Tonkin had already indicated management's willingness to match whatever increase was paid in the industry [Tr. 256], it was the general understanding of the men when the meeting ended that things were settled, the terms agreed to, and that a contract would be signed as a member of course on Monday morning [Tr. 83; 100; 334; 340; 350-1]. The negotiating committee was authorized to convey this acceptance to the Tonkins.

The union negotiating committee, consisting of Incumbent officers, President Howard Hill, Secretary-Treasurer William Barwise and Directors Olson and Williams, then went to the Petitioner's office to state that the members had agreed to accept the wage increase, overtime and the "most favored nation" clause [Op. p. 3].

Other matters were discussed at this meeting and Tonkin made oral concessions on the issue of paid holidays and sick leave [Op. p. 3; Tr. 25-6; 100-02; 83; 178-83; 260-4; 297-9]; agreement was made to re-examine and improve the driver-salesman bonus system, a commitment, in fact, fullfilled [Op. pp. 1 and 3; Tr. 109]; Petitioner further agreed to improve the disability and health programs when financially able, even though in the preceding year it had voluntarily instituted a better plan than before [Op. p. 3]. In addition, the Tonkins agreed to consider a pension plan, but pointed out that Petitioner was not yet financially able to qualify for one [Tr. 25-6; 83; 100-02; 109; 178-83; 260-4; 297-9].

When the meeting broke up, the parties shook hands. The Incumbent negotiating committee informed the management they would have to submit the agreement for ratification to the full membership and that a meeting would be held for that purpose before work Monday morning, April 1 [Op. p. 4; Tr. 297-9; 183].

Sunday, 31 March, at Barwise's suggestion, he, President Hill and Director Williams, attended a meeting with a representative of the Teamsters [Op. p. 4; Resp. Br. p. 5; Tr. 26-7]. This was the *first* contact between any of Petitioner's employees and the Teamsters. There they signed Teamster cards and, later in the day, solicited several other Incumbent members on behalf of the Teamsters [Op. p. 4; Tr. 288; 335-6; 341-2].

When the men reported for work on Monday morning, April 1, they found that the gate to the adjoining parking lot, where Petitioner's trucks were kept, was locked. At the hearing before the Board, Tonkin testified that he did not unlock the gate in the morning simply because he wanted to insure that early starters would not leave on their routes without being notified of the Union meeting to be held for ratification of the contract [Op. p. 4]. This is the act of the Petitioner which the Court and the Board have characterized as the "lockout".

At the meeting, the officers, instead of urging ratification of the agreement they had negotiated, solicited further signatures on behalf of the Teamsters, and, as a consequence, the contract failed of ratification by a vote of nine to eight.

Tonkin was told of this and expressed dismay. He indicated that he intended to hold the Union to the

agreement reached on 29 March and would insist upon ratification [Op. p. 4]. The contract was rejected a second time by the same vote [Op. p. 4].

A number of the men were completely puzzled by the whole proceeding since they, as the Tonkins, had assumed matters to have been satisfactorily settled the preceding Friday and were at a loss to understand what all the milling around was about that morning [Tr. 337-8; 340-4; 347; 350-2].

A second meeting was held in Petitioner's office, and Tonkin stated that he had been informed by counsel that the oral agreement reached Friday night was valid and binding and he felt the Incumbent was obligated to sign the contract embodying that agreement. He hoped and expected that he could rely upon the integrity of the Incumbent officers, and if the officers did not recognize this, perhaps the Incumbent should elect new officers. The men met again, the members commenced filing into the plant, and the contract was signed by Barwise and Hill [Op. p. 5].

The following day, 2 April, the Teamsters filed a petition with the Board for a representative election among Petitioner's employees. This was the first and only action taken by the Teamsters to achieve representative status and even this did not come to the Petitioner's attention until 5 April, when Petitioner and the Incumbent received letters from the Board informing them of the Petition and requesting a copy of the contract, if any, they had entered into.

The Union's president, Hill, asked the Tonkins after work on April 5, if they had received the letter from the Board. Hill stated that he had no means by which to make copies of the contract. Tonkin stated that he

would send copies in for the Union if they so desired. Hill replied that he would contact the Union's attorney. Instead, the Union contacted a representative of the Teamsters [Op. p. 5; Tr. 38-9] who informed them that it made no difference whether they sent a contract in. Hill informed management that, as far as the Union was concerned, management had complete discretion in either sending in a copy for the Union or not. Tonkin sent a copy in for management and also one for the Union, giving the Union's return address [Op. pp. 5-6]. This act of Petitioner has been stigmatized by the court below (and the Board) as evidencing anti-Teamster bias.

The original unfair labor practice charge was filed 5 April, 1963. On 9 April, Barwise was discharged. The Tonkins stated this was because of his poor performance as a route salesman and because his sales had fallen off sharply. An amended charge was filed some seven weeks later, 29 May, alleging unlawful discharge of Barwise.

The Board's Complaint charged Petitioner with violation of § 8 (a), (1), (2), and (3) of the Act. Subsequent to hearings on the charge, held during August, 1963, before a Trial Examiner, the Board, on 10 June, 1964, issued its Decision and Order thereon, (147 NLRB No. 48). It was charged, but *not* found, that the Incumbent was dominated or assisted unlawfully by Petitioner. The Board did find that Petitioner had violated the aforesaid sections of the Act by unlawfully interfering with the administration of the Incumbent otherwise interfering with the rights of employees secured to them by the Act in locking them out, and by discharging Barwise from its employ. It should be noted

that the Trial Examiner's findings and the Board's Original Order were made prior to this Court's decision in *American Ship.* Thereafter, on 10 November, 1965, the Court issued its decision enforcing the Original Order in part, (pertaining to the discharge of Barwise in an admittedly close case) *NLRB v. Tonkin Corporation, supra,* at 511, and remanding the balance of the matter to the Board for further consideration in light of the *American Ship* decision, *supra.* On May 27, 1966, the Board, pursuant to direction of the Court on remand, issued its Supplemental Order, (*supra*).

In its Suplemental Order, the Board relied upon: (1) Tonkin's statements at the 29 March and 1 April meetings; and (2) coupled them with his subsequent sending of the copies of the contract to the Board on behalf of the Incumbent to find that Petitioner's purpose in (3) locking out its employees was to prevent them from having a free choice in determining their bargaining representative, to encourage membership in the Incumbent, and discourage membership in the Teamsters. Petitioner was, therefore, held to be in violation of § 8 (a) (1), (2) and (3) of the Act.

The Court below upheld the Board, stating that the record in the case supported the Supplemental Order. The Court found that in keeping the gates locked on 1 April, Petitioner's purpose was to prevent its employees from freely determining their bargaining representative and otherwise keeping the Incumbent "subservient" to it as a bargaining representative.

Citing the three incidents relied upon by the Board, the Court stated there was substantial evidence to support the Board's finding that Petitioner violated § 8 (a) (1), (2) and (3) of the Act.

ARGUMENT FOR ALLOWANCE OF WRIT.

As stated above, five general questions of major importance to labor-management relations await resolution in substantial part by the ultimate decision in this case.

Generally, the questions involve policies of the National Labor Relations Act 29 U.S.C.A. § 151 *et seq.* (hereinafter referred to as the "Act"), the decisions under that Act, and their reconciliation with the issues in this case.

Specifically, where an employer and the union that legally represents its employees are engaged in collective bargaining, does the mere existence of a rival union that desires to supplant the Incumbent, but which has made no effort to claim representation, nor to demand recognition, require that the employer remain silent, or may the employer express its preference for continuance of negotiations within the current bargaining relationship?

Similarly, there arises a serious conflict between the employer's well settled duty to continue to bargain with the Incumbent union under the foregoing circumstances and what appears to be a contrary duty, imposed by the Court's opinion, to suspend negotiations, abrogate an agreement reached, and withdraw recognition from the Incumbent, thus exposing itself to an unfair labor practice charge of refusal to bargain (a charge which in fact was made in this case, but not prosecuted for obvious reasons).

Further, questions are presented regarding application of the fiduciary duty imposed upon union officers, by 29 USCA § 501 (a) and (b), to the duty of the union to bargain with the employer in good faith pur-

suant to § 8 (b) and (d) of the Act, *vis a vis* the duty of the employer to bargain in good faith with the union. Here the union officers, having bargained to agreement with the employer, subsequently attempted to subvert that agreement and the acknowledged bargaining relationship, as well as the bargaining process itself, by actively proselytizing its members on behalf of the rival union and counseling against ratification of the very agreement they had negotiated.

May not the employer rely and insist upon fulfillment of these duties?

Under the foregoing circumstances, the Court is asked to review the Opinion of the court below, which offers a new and antithetical interpretation of *American Ship*. The court below has held to be unfair labor practices an employer's temporary lockout in support of its legitimate bargaining position, and employer activity in support of the continuing bargaining process in observance of its well settled duty to recognize and negotiate with the acknowledged and long-time representative of its employees. This conduct has been converted into an unfair labor practice by the mere presence of a rival union of unknown strength, which makes no demand for recognition nor claim of representation, and thus is outside the bargaining process, and by the activities of Incumbent union's officers on behalf of that rival union.

Petitioner contends that the cause herein presents a context within which this Court can reaffirm the policies of the Act regarding a stable, good faith, collective bargaining relation, and the concomitant rights and duties involved therein, which, we submit, have been radically altered by the Court below.

We believe the importance of these questions themselves argues for the issuance of the Writ in this case. However, with specific reference to the criteria enumerated by Rule 19, we discuss the matter further below.

Opinion of the Court of Appeals Herein Constitutes a Misapplication of Decisions of This Court.

We submit that the Opinion of the Court of Appeals herein is in conflict with the applicable rules and policy enunciated by this Court in *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965).

In *American Ship, supra,* the majority held that it was not an unfair labor practice within the meaning of § 8 (a) (1) and (3) of the Act, for an employer to lock out its employees temporarily with the sole object of applying economic pressure to support a legitimate bargaining position, after an impasse in collective bargaining negotiations has been reached (*Id.* at 308).

In so holding, the Court emphasized that there was "no allegation that the employer used a lock-out in the service of designs inimical to the process of collective bargaining. There is no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining, or that the lockout was designed to discipline them for doing so." (*Id.* at 308-309).

The Court of Appeals below has held that the record supports the Board's finding that Tonkins' purpose in the lockout was to prevent its employees from freely determining their bargaining representative and other-

wise keeping the union "subservient" to it, thus precluding the application of the *American Ship* decision to the lockout.

We urge that even though the employer may have preferred to continue to deal with the Incumbent, this does not (under the facts) constitute unlawful motivation or purpose. The negotiations and conclusion of agreement both antedated all contact with the rival Teamsters, and even at the time of the lockout, no question of representation had arisen. In fact, the lockout antedated not only the Teamsters' petition, but the events which called it to Petitioner's notice.

As a general matter, it cannot be said that a lockout will necessarily destroy the union's capacity for effective and responsible representation (*Id.* at 309). And in this case, the evidence does not show that the lockout impaired the ability of the Incumbent to represent the employees. That ability was unaffected by the lockout. If there was any such impairment, it could only be attributed to the defection of the Incumbent's officers. There is no showing that the Incumbent was "subservient" to Petitioner at any time. Indeed, the effectiveness of the Incumbent's representation is cogently evidenced by the number and significance of the concessions it wrung from Petitioner.

The proscribed motivation to show violation of § 8 (a) (3) of the Act is a discrimination in tenure and other conditions of employment to discourage union membership, and a resulting discouragement of union membership generally. The Supplemental Order of the Board and the Opinion of the Court show no such motivation on the part of the Petitioner; and if there was

discouragement of union membership, it must again be attributed to the conduct of the Incumbent's officers.[3]

By the same token, since there was not then (or ever) presented any real or cognizable question of rival union representation, it should not be construed as a violation of § 8 (a) (2) to insist that the Incumbent execute in writing the agreement previously arrived at, as provided in § 8 (d) of the Act. *NLRB v. Golden State Bottling Company,* 353 F. 2d 667 (9th Cir. 1965); *NLRB v. Swift & Co.,* 294 F. 2d 285 (3d Cir. 1961).

Again, the desire for stability and continuity in a collective bargaining relationship, as envisioned by the Act, should not be transmuted to improper motivation merely by the advent of a rival union of unknown strength and activity, and the activities of the Incumbent officers in violation of § 29 U.S.C. 501 (a) and (b).

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[3]See *Colgate-Palmolive-Peet Co. v. NLRB,* 338 U.S. 355, 94 L. Ed. 161. This Court reversed the court below and ordered a dismissal of the Complaint charging that employer violated § 8 (a) (3) of the Act. The employer had discharged several employees at the request of the bargaining representative pursuant to a valid closed-shop agreement, on the grounds that they were no longer "members in good standing" of the union, as required by the contract, because they had been actively proselytizing on behalf of a rival union.

This Court stated "It must be remembered that this is a contest primarily between labor unions for control. It is quite reasonable to suppose that Congress thought it conducive to stability of labor relations that parties be required to live up to a valid closed-shop contract made voluntarily with the recognized bargaining representative regardless of internal disruptions growing out of agitation for a change in bargaining representative. In the instant case the employees exercised their right to choose their bargaining representative. The representative bound them to a valid contract. The contract was lived under for four years and was subsisting at the period of time in question. It was made and carried out in good faith by petitioner, who cannot be held guilty of an unfair labor practice by administrative amendment of the statute." (at p. 364). See also *Johnson v. Nelson,* 325 F. 2d 646, 650 (8th Cir. 1963).

In this case, the lockout was not inimical to the bargaining process, but, on the contrary, was supportive of the position taken in good faith during and preceding the negotiations and, therefore, *supportive* of the collective bargaining process itself.

So long as an employer is obliged to continue recognition and negotiations, it is hardly consistent or fair to hold that he may not *desire* to continue that relationship or resist the *post facto* efforts of an incumbent's officers to repudiate an agreement between the employer and the union. Indeed, it is the policy of the Act and the Board to encourage such desire. (*Stewart Warner Corp.*, 31 LRRM 1397, 102 NLRB No. 310 (1955); *Rold Gold of California*, 43 LRRM 1421, 123 NLRB No. 24 (1959); *Colgate-Palmolive-Peet Co. v. N.L.R.B., supra; N.L.R.B. v. Swift & Co.*, 294 F. 2d 285 (3d. Cir. 1961); *Ensher, Alexander & Barsoom, Inc.*, 74 NLRB 1443, 1445 (1947).)

The Opinion of the Court of Appeals Below Has Rendered a Decision in Conflict With the Decision of Another Court of Appeals on the Same Matter.

We submit that the Opinion below conflicts with the decision in *NLRB v. Swift & Co.*, 294 F. 2d 285 (3d Cir. 1961).[4] (hereinafter referred as *"Swift"*).

In the *Swift* case, the Court declared that it was not a violation of § 8 (a) (1) or (2) of the Act for an employer to enter into an agreement with a previously certified union even while a petition for an elec-

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[4]See also *NLRB v. North Electric Company*, 296 F. 2d 137 (6th Cir. 1961); *St. Louis Independent Packing Co. v. NLRB*, 291 F. 2d 700, 704 (7th Cir. 1961).

tion is pending, and it refused to enforce the Board's order to the contrary.

The Court held there must be a finding of a *real* question of representation; *i.e.,* that the employer had a reasonable basis for believing that the incumbent union no longer represented a majority.

The Board relied upon the filing of a petition for representation by a rival union and an administrative determination that a hearing thereon should be held to show a "real question" of representation.

No election was ever ordered or held. The court stated at page 288, "These facts, we think, are clearly insufficient, for at most they establish the existence of a *naked claim* on the part of the meat cutters to majority representation." (Emphasis added).

Of course, a real question of representation can arise in another way not present here. In the cause herein there was no question *at all* of representation. All the pertinent activities took place prior to Petitioner's actual knowledge of Teamster activity and prior to the filing of the Teamster petition. It is the responsibility of the general counsel of the Board to show by a preponderance of evidence that a real question exists. *William Penn Broadcasting Co.,* 93 NLRB 1104 (1951); *Swift, supra,* at 287.

There is no such finding in this case, and yet the court has held that this employer violated the Act when it continued to bargain and deal with the Incumbent and to utilize the economic weapons at its disposal in support of such dealing—in flat contradition to the rule enunciated in *Swift.*

The Opinion of the Court of Appeals Below Has Decided (Erroneously, We Submit) Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

The Opinion of the Court of Appeals supported the Board's Supplemental Decision that *American Ship, supra,* was not controlling because of the "unlawful purpose" it attributed to the Petitioner in locking out its employees. It asks, "If a contract was, in fact, made on March 29, why was Petitioner so concerned to have its employees sign it on Monday morning, unless he wanted to use the signed Contract to prevent the Teamsters from organizing its employees?" [Op. p. 9].

However the Board itself has held, in the interest of stability of labor relations, that an employer may deal freely with the majority union and execute an agreement prior to the filing of an outside representation petition, even though he may be aware of a rival union's organizing campaign, and even though a "bare claim" shall have been made. *Deluxe Metal Furniture Co.,* 121 NLRB 995, 999 (1958); *Portland Associated Mortician's Inc.,* 163 NLRB No. 76 (April 2, 1967); see *NLRB v. Swift & Co., supra.*[5]

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[5]In discussing whether the employer has a duty to deal with the incumbent union in the face of the filing by a rival union of a representative petition with the Board and an administrative determination that a hearing should be held thereon, the court had to determine whether a real question of representation existed. It cites the Board's own language in determining whether or not the Midwestern Piping doctrine, *Midwest Piping & Supply Co.,* 63 NLRB 1060 (1945), should be applied

(This footnote is continued on the next page)

If this is so, then we submit that, just as the employer may deal with a majority union, so may he lock it out, and, *a fortiori,* threaten to do so. *NLRB v. Servette, Inc.,* 377 U.S. 46 at page 57. The lockout is an integral part of the employer's approach to collective bargaining, so long as the employer does not use it in the service of designs inimical to the process of collective bargaining, *American Ship, supra,* at 308-309, or to discourage union membership generally.

There is nothing in the language of *American Ship* to suggest that this Court intended that the employer's right to lock out, in support of its legitimate bargaining position, hinged upon the presence or absence of a rival union of unknown strength, *though this is the precise effect of the Court of Appeals' ruling.*

Indeed, until presented with concrete evidence in the form of a rival demand for recognition or a claim of representation, the Company was obligated under the law to negotiate with the Incumbent. It could not have assumed that the Teamsters had majority support and therefore cease dealing with the Incumbent on that ground without violating § 8 (a) and (5) of the Act.

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in a given case. ". . . That doctrine, necessary though it is to protect freedom of choice in certain situations, *can easily operate in derogation of the practice of continued collective bargaining, and should, therefore, be strictly construed and sparingly applied.*" (Emphasis added). *Ensher, Alexander & Barsoom, Inc.,* 74 NLRB 1443, 1445 (1947).

It should be noted that in *Midwest Pipe* there was found a real question of representation. In *Swift* and *Ensher* there was no finding of a real question of representation. The cause herein, therefore, sets forth an *a fortiori* case, since there is no question *at all.*

(*NLRB v. Kellogg's Inc.*, 347 F. 2d 219 (9th Cir. 1965); *Snow v. NLRB*, 308 F. 2d 687 (9th Cir. 1962); *St. Louis Independent Packing Co. v. NLRB, supra*, at p. 705.

The Court's decision below has offered the Petitioner a Hobson's choice: notwithstanding that the Teamsters had made no cognizable claim of representation nor demand for recognition, Petitioner nonetheless, without knowing the extent of Teamster activity or the extent of employee support for that activity, is apparently required to anticipate a Teamster claim or demand and withdraw recognition and cease negotiations with the Incumbent on these assumptions. Under existing court decisions this conduct would subject Petitioner to charge of unfair labor practice and would be in derogation of the policies of the Board itself. In the alternative, Petitioner could have continued to bargain in good faith within the historic bargaining relationship, as it chose to do, to its equal misfortune, since the Court in this cause has held it to be in violation of the Act for doing so.

The policy of the Act as enunciated by the Board and by the courts has been to encourage bona fide bargaining within a stable and continuous relationship, so long as there is no real question of alternative representation found. It is submitted that no such question existed or was found and that Petitioner has acted in consonance with these policies, only to be held in violation of the Act.

Conclusion.

We believe it is evident from the foregoing that the circumstances of the within cause, the importance of the questions involved, the uncertain state of the law on the subject matter created by the Opinion below, compel the granting of the within Petition and the issuance of the Writ as prayed.

Respectfully submitted,

HODGE, JACKSON, KUMLER & CROSKEY,
By MORTON B. JACKSON,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Tonkin Corporation of California, dba Seven-Up Bottling Company of Sacramento, *Petitioner,* vs. National Labor Relations Board, *Respondent.* No. 21,130

[March 29, 1968]

On Petition to Review an Order of the National Labor Relations Board and Cross-Petition for Enforcement of the Order

Before: Chambers and Hamley, Circuit Judges; and Wollenberg, District Judge

Wollenberg, District Judge:

This is a petition for review of the Supplemental Decision and Order of the National Labor Relations Board pursuant to Section 10(f) of the National Labor Relations Act (29 U.S.C. §160 et seq.). The Board has cross-petitioned for enforcement of its order. 29 U.S.C. §160(e). This Court has jurisdiction pursuant to Section 10(f), *supra.*

Petitioner is engaged in the business of bottling and distributing soft-drink products, including "Seven-Up", in the Sacramento area. The "Seven-Up Employees Union" [hereinafter referred to as the Independent Union] had been the bargaining representative for many years for petitioner's plant employees and route salesmen. It was formed originally by employees of petitioner in order to keep the Teamsters Union from

gaining any representation. Its meetings were informal, infrequent, and largely social. It has never filed a grievance with petitioner. At the time of the events involved in the present dispute, a contract was in existence between petitioner and the Independent Union which was to expire on April 1, 1963.

Early in 1963, members of the Independent Union began discussing terms which they wanted incorporated into the new contract. These terms were presented to petitioner. A meeting was called for Friday, March 29, by petitioner to explain its position to the Independent Union. At the meeting, petitioner's president, Harry Tonkin, proposed a wage increase of $3.00 per week and offered to pay the men time and one-half for overtime. He also stated that the company would match any increase in wages paid by other local soft-drink companies. Sick leave benefits, paid holidays, and vacations, bonuses, and pension plans were also discussed at the meeting.

Tonkin stated that he was aware of Teamster organizational activities among his employees and that he wanted to negotiate with the Independent Union rather than the Teamsters.[1] Several of the men present at the meeting testified at the Board hearing that Tonkin stated that the men would not be able to go to work the following Monday unless a contract was signed.

The meeting was adjourned so that the men could discuss the company's proposals. It was agreed that

[1]The Board concedes that Tonkin was mistaken in asserting that Teamster activities were occurring on March 29, since it is undisputed by the record that the first contact had by the employees with the Teamsters was on the following Sunday, March 31. However, such statements are relevant in showing petitioner's motivation with respect to the subsequent events of April 1.

representatives would meet later with the company to relate the results of the meeting. There was a general consensus to accept the proposals in view of the overtime and "most favored nation" terms. No formal vote was ever taken by the men since many left the meeting before one could be taken.

A group of the employees then went to the offices of the company to report the results of their meeting. They informed management that the men had agreed to accept the wage increase and the proposal to pay overtime if the company would agree to match any further increase in wages of similar local industries, particularly the local Pepsi-Cola distributor who was then in negotiations with its employees. Tonkin stated that he would find out about any increase in that area. Tonkin found out the next day that Pepsi and its employees were dead-locked over wages and reported this to the Independent.

At the Friday evening meeting, the management-Union group also talked about paid holidays and sick leave. Tonkin orally agreed that a man's birthday would be considered a paid holiday, but did not want to put this term into the written contract. He also stated that the men would not be docked when they were sick, but again did not want to put this term in writing for fear of possible abuses.

The subject of bonuses was discussed, with Tonkin agreeing to look into the matter further. Regarding the disability and pension plan, Tonkin informed the men that he could not afford to change the plan, but that in the past year management had instituted a better plan than before.

When the meeting broke up, the parties shook hands. The Independent informed management that they would have to submit the agreement for ratification to their full membership and that a meeting would be held Monday morning, April 1, for that purpose.

On Sunday, March 31, several of the members of the Independent attended a meeting at the home of a Pepsi-Cola employee where a representative of the Teamsters was present. The men from the Independent signed authorization cards for the Teamsters, and later in the day solicited several other of petitioner's employees to sign such cards.

When the men reported for work on Monday morning, April 1, they found that the gate to the adjoining parking lot where petitioner's trucks were kept was locked. At the hearing before the Board, Tonkin testified that he did not unlock the gate in the morning because he wanted to insure that early starters would not leave on their routes without being notified of the Union meeting to be held for ratification of the contract.

The men had an informal meeting to discuss the ratification and rejected the contract by a vote of nine to eight. Tonkin was informed of this and expressed dismay. At some time during this period, Tonkin stated that the men would not be able to go to work until a contract was signed, "We have this contract and if any of the union officials don't want to go to work we will have a new election and get new plant union officials".

A second vote was taken by the Union with the result the same as the first. In the interim, more authorizations were solicited and given to a Teamster representative who was in a car parked nearby.

Tonkin was informed of the results of the second vote. He testified at the Board hearing that he informed the men that he had consulted with his attorney who informed him that a contract had been formed on Friday evening and that the Union was obligated to sign it on Monday. The Union met again and the men filed slowly back into the plant. Barwise, one of the employees, signed the contract as Secretary-Treasurer of the Independent Union. Barwise asked if any reprisals would ensue as a result of his Teamster activity. He was informed by Tonkin that no action would be taken against any employee.

On April 2, the Teamsters filed a petition with the Board for a representative election among petitioner's employees. A letter was received by petitioner and the Independent on April 5 from the Board informing them of the representation petition and asking if they would send copies of the bargaining contract, if any, they had entered into.

The Union's president, Hill, asked management after work on April 5, if they had received the letter from the Board. Hill stated that he had no means by which to make copies of the contract. Tonkin stated that he would make copies of the contract. Tonkin stated that he would send copies in for the Union if they so desired. Hill replied that he would contact the Union's attorney. Instead, the Union contacted a representative of the Teamsters who informed them that it made no difference whether they sent a contract in. Hill informed management that as far as the Union was concerned, management had complete discretion in either sending a copy for the Union or not. Tonkin sent a copy in for

management and also one for the Union, giving the Union's return address.

The original unfair labor practice charge was filed April 5, 1963. On April 9, Barwise was discharged. The amended charge was filed May 29, alleging unlawful discharge of Barwise.

The Board's complaint charged petitioner with violations of Section 8(a)(1), (2), and (3) of the Act. A hearing was held, and the Trial Examiner issued his decision, finding petitioner in violation of the above-mentioned sections of the Act. The Board adopted the findings of the Examiner. Petitioner was ordered to withdraw and withhold recognition of the Union until such time as it may be certified by the Board. It was also ordered to cease from giving effect to the April 1 contract.

Following this decision, the Board petitioned this Court for enforcement of its order. *N.L.R.B. v. Tonkin Corporation,* 352 F.2d 509 (9th Cir. 1965). We affirmed the decision of the Board in respect to its finding that Barwise had been discharged in violation of Section 8(a)(1) and (3) of the Act, stating:

> "However, respondent's knowledge of Barwise's efforts on behalf of Teamster representation, coupled with the timing of the discharge, persuade us that the Board could reasonably have drawn the inference it did from the facts in evidence and all surrounding circumstances, notwithstanding the existence of justifiable grounds which, under other circumstances, might have permitted dismissal." 352 F.2d 509, at 511, *supra.*

With respect to the Board's order on the lockout issues, we remanded to the Board to reconsider its decision in light of the subsequent decision of the Supreme Court in *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965). In this regard, we stated:

> "Without deciding whether respondent in fact locked out is employees as alleged, we note at the outset that the order sought to be enforced was issued before American Ship was decided, and at a time when the Board held the view that, absent special circumstances not present here, a 'lockout' for the purpose of exerting economic pressure to secure more favorable contract terms, after a bargaining impasse had been reached, was an unfair labor practice within the meaning of §8(a)(1), (3) and (5) of the Act. [Cases omitted].
>
> "In American Ship, the Court decided that it was not unfair labor practice, within the meaning of §8(a)(1) and (3), for an employer temporarily to lock out his employees with the sole object of applying economic pressure to support a legitimate bargaining position, after an impasse in collective-bargaining negotiations had been reached. And the Court specifically stated: 'This is the only issue before us, and all that we decide.' [American Ship Building Co. v. N.L.R.B., supra, 380 U.S. at 308, 85 S.Ct. at 962.]" 352 F.2d at 510.

In its Supplemental Decision, the Board found *American Ship* not to be controlling because of the unlawful purpose it attributed to petitioner in locking out its employees. It relied upon Tonkin's statements at the March 29 meeting and on April 1, coupled with his

subsequent conduct in sending in a copy of the contract to the Board on behalf of the Union, to show that petitioner's purpose in locking out its employees on April 1 was to prevent its employees from having a free choice in determining its bargaining representatives in violation of Section 8(a)(1), (2), and (3) of the Act.

We note that in *American Ship,* the Court emphasized that there was "no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining. There was no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining or that the lockout was designed to discipline them for doing so." *American Ship,* supra, 380 U.S. at 308-309.

The record in the instant case supports the Board's finding that in keeping the gates locked on April 1, petitioner's purpose was to prevent its employees from freely determining their bargaining representative and otherwise keeping the Union subservient to it as a bargaining representative. Tonkin's statement at the March 29 meeting to the effect that he did not want to bargain with the Teamsters shows this purpose,[2] as well as his statements on March 29 and April 1 that nobody would work unless a contract was signed. His subsequent conduct in mailing a copy of the contract on behalf of the Union to the Board supports the Board's finding that petitioner wanted to keep the Teamsters from representing his employees.

Petitioner asserts that a contract was in fact made on the evening of March 29; hence, its conduct on April 1 was merely an attempt to secure the fruits of this con-

[2]See Note 1, *supra.*

tract. If a contract was in fact made on March 29, why was petitioner so concerned to have his employees sign it on Monday morning, unless he wanted to use the signed contract to prevent the Teamsters from organizing his employees? Moreover, petitioner's subsequent conduct in discharging Barwise, affirmed by this Court, supports the view that petitioner's purpose on April 1 was not to secure the fruits of an agreement allegedly made, but rather to keep the Teamsters from organizing his employees. Even his testimony before the Board shows that petitioner did not want the Teamsters to represent his employees. Hence, he explained that while he did not tell the men that he did not want to negotiate with the Teamsters; rather, he pointed out the disadvantages to them of joining that organization with the possibility that they would have to join strikes when they had no grievance with their employer.

On the record before us, we cannot say that there is not substantial evidence to support the Board's findings that petitioner committed unfair labor practices in violation of Section 8(a)(1), (2), and (3) of the Act.

Accordingly, the petition for review is DENIED. The Board's cross-petition for enforcement of its order is GRANTED, and said orders is to be enforced in all respects.

APPENDIX B.

Text of Labor Management Relations Act, 1947, as Amended by Public Law 86-257, 1959.

[Public Law 101—80th Congress]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in

their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his empoyees subject to the provisions of section 9(a);

* * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. . . . (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the

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IN THE

Supreme Court of the United States

October Term, 1968
No. 234

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Supplemental Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

SUBCHAPTER VI.—SAFEGUARDS FOR LABOR ORGANIZATIONS

§ *501. Fiduciary responsibility of officers of labor organizations—Duties of officers; exculpatory provisions and resolutions void*

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and by laws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made *ex parte*. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

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IN THE

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Respondent.

Supplemental Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX I.

Trial Examiner's Decision.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento and Edward J. Farrell, An Individual and Sacramento 7-Up Employees' Union Party to the Contract. Case No. 20-CA-2657.

Walter L. Kintz, Esq., of San Francisco, Calif., for the General Counsel.

Le Prohn & Le Prohn, by *Stuart Weinberg, Esq.*, of San Francisco, Calif., for the Charging Party.

Hill, Farrer & Burrill, by *Edwin H. Franzen, Esq.,* and *Morton B. Jackson, Esq.,* of Los Angeles, Calif., for the Respondent.

Before: *Wallace E. Royster,* Trial Examiner.

Statement of the Case.

This matter came on to be heard before me in Sacramento, California, on August 26, 27 and 28, 1963,[1] upon a complaint issued June 28 by the Acting Regional Director of the National Labor Relations Board, San Francisco, California, based upon charges filed April 5 and May 29. In essence the complaint alleges that Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento, herein the Respondent, has dominated and interfered with the administration of Sacramento 7-Up Employees' Union, herein the Union, and has unlawfully discharged its employees, William D. Barwise and Donald P. Olson. It is alleged that the Respondent has thereby violated Sections 8(a)(1), (2) and (3) of the National Labor Relations Act, as amended, herein the Act.

Briefs have been received from counsel for the General Counsel and counsel for the Respondent. The unopposed motion of counsel for the Respondent to correct the transcript in certain particulars is hereby granted.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent

The Respondent is a California corporation with its principal place of business in Sacramento, California,

[1] All dates mentioned are in 1963, except as otherwise shown.

where it is engaged in the operation of a soft drink bottling plant and the sale and distribution of soft drinks at wholesale. During the year preceding the issuance of the complaint, the Respondent purchased and received goods and services valued at more than $50,000 from points and places outside the State of California. I find, as Respondent's answer admits, that the Respondent is and at all times material herein has been an employee engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The organizations involved

Chauffeurs, Teamsters & Helpers, Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein the Teamsters, and the Union, each is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

For a number of years the Respondent has dealt with the Union which exists only among Respondent's employees. Contracts have resulted requiring membership in the Union as a condition of employment and providing for the checkoff of Union dues. The Union has not been an active organization and its membership meetings have been few. In February 1963, James Elder retired as the Union's president explaining that he had been given duties of a management character and that membership in the Union was incompatible with his new status. Elder had figured in the Union's initial organization or perhaps reorganization and did

so, he testified, in order to forestall any such activity on the part of the Teamsters.

It is the contention of the General Counsel that the Respondent found in the Union a weak and malleable instrument through which the employees were denied a purposeful and effective collective bargaining agency; and that the Respondent by denying employees opportunity to work and by discharging its employees, William Barwise and Donald Olson, sought not only to preserve the existence of the Union but also to forestall any possibility that the Teamsters might replace it.

On March 27, 1963, after a number of meetings between the Respondent and representatives of the Union in the matter of reaching agreement on a collective bargaining contract to succeed the one expiring March 31, the employees rejected the Respondent's most recent offer. On Friday evening, March 29, the Respondent called a meeting of all employees and Harry Tonkin spoke to them. Tonkin testified that he told the men he would like to have the contract signed so that all could go to work on Monday in harmony and went on to say that anyone who did not want to work under the conditions Respondent proposed was free to leave. Tonkin also made some mention of the Teamsters. On this occasion, according to the testimony of William D. Barwise, a route driver whose subsequent discharge is alleged to have been unlawful, Tonkin said that some of the men had been contacted by the Teamsters; that their own union was a good one; that he would like to preserve the present relationship; and that he did not want to negotiate with the Teamsters. Again the employees did not come to agreement and no contract was approved.

On Sunday, March 31, Barwise met with some employees of other bottling companies in the area and signed a card designating the Teamsters as his bargaining representative. Upon his solicitation that afternoon and the next morning, eight or nine other drivers signed such cards.

On April 1, none of the employees was permitted to begin work until the contract question was settled. Harry Tonkin told them, Barwise testified, that if the officers of the Union did not want to sign the proffered contract, some other means would be found to secure its validation. Donald Olson testified that the Tonkins said "they had to have a contract signed before they would open the gate"; that there was no lack of job applicants; and that if the Union's officers didn't want to work, new officers could be elected. Howard Hill, the Union's president and still Respondent's employee, testified that the Tonkins said in connection with signing the contract that there would be no work available unless this was done; that many persons were applying for work; that "we will either have a contract or we will figure out a way we will get one," and that no one could go to work until the contract was in effect.

Although Respondent's proposals were rejected on the two occasions when votes were cast on the question of acceptance in the morning of April 1, the employees at last capitulated and without formal approval of the membership, the Union's officers signed the new contract. At the time of signing, one of the Tonkins said that they would find out who had been soliciting for the Teamsters. Barwise said that he was one of them. Millard Tonkins said that there would be no reprisals for such activity.

It is clear from the testimony of all those who were questioned about what passed between the Respondent and the employees leading to the execution of the new contract on April 1, that Harry Tonkin took the position that work could not resume on April 1 unless the contract was accepted. Tonkin himself testified that he had the gate to the truck lot locked on that morning because he did not want anyone to go to work before voting on the contract and before agreement was reached. George Wymore, still employed as a route driver, testified that on April 1 the Tonkins suggested that the men might have to dissolve the Union and elect new officers in order that the contract be signed.

I find that the Respondent told the employees on and before April 1 that they could not work unless the contract was signed. Literally, the employees were locked out on April 1 to force the acceptance of Respondent's contract proposals. No defense of economic necessity has been advanced or even suggested for this action. No strike had been threatened. I find that the lockout of April 1 discriminated against employees in regard to their employment to force them to accept contract terms to which they had not agreed. The Respondent thus discouraged membership in a labor organization for by forcing agreement it diminished by means of discrimination the value of representation. It also interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act. The Respondent has thus engaged in the commission of unfair labor practices violative of Section 8(a)(1) and (3) of the Act.

In February, Barwise was elected to the office of secretary in the Union and in that capacity participated

in all the bargaining sessions that followed. It may be recalled that on March 31, Barwise accepted Teamster designation cards and secured signatures upon nine of them from Respondent's employees. As Harry Tonkin readily acceded in his testimony, the Respondent became aware of this circumstance on April 1.

In the quarter ending March 31, Barwise exceeded the sales' quota on his route and in consequence was paid a bonus approximating $60. Most of the drivers, if not all of them, also qualified for such payments. Emmett Cantrell, Respondent's sales manager, testified that Barwise exceeded his quota in two of the 3 months comprising this quarter but that in only one month in the other approximately 11 months of his employment did he accomplish such a result.

About April 4, the Tonkins, Cantrell, and Route Supervisors Kenneth Meyer, Larry Haynes, and Hassell Hilton were in San Francisco for a business purpose and met one evening at a restaurant. According to all but Hilton, the proficiency of the several route salesmen was discussed and a consensue reached that Barwise was the poorest among them and that another salesman, Donald Olson, was little better. Hilton, who left Respondent's employ in June, testified that he recalled no mention of Barwise at the restaurant meeting and that he considered Barwise to be an "average" salesman. Harry Tonkin testified that the group decided that Barwise and Olson should be replaced but did not mention in his testimony that any date for such action was chosen.

On April 2, the Teamsters filed a representation petition seeking an election among Respondent's employees. The Regional Office of the Board in San Francisco

notified the Respondent and the Union of this circumstance and requested to be informed if any labor organization had been designated as the representative of Respondent's employees or if a collective bargaining contract was in existence. Union President Hill and Secretary Barwise spoke with the Tonkins on April 5 in this connection. Hill and Barwise said that they were indifferent in the matter and did not intend to reply to the inquiry. Hill observed that the petition resulted from designations supplied to the Teamsters by him and by Barwise. Millard Tonkin, upon the understanding, he testified, that the Union officials were agreeable to such a course or perhaps even desirous of it, sent in copies of that agreement over the printed signature of the Union. Thus the Respondent evidenced to the Board an interest in representation on the part of the Union that its officers did not care to assert. This action will be adverted to later as it demonstrates the strong desire of the Respondent to keep the Union as an ostensibly viable organization.

On April 8, a Monday, a charge was served upon the Respondent alleging that it had dominated the Union and had refused to bargain with the Union. At the close of the next day, April 9, according to the credited and undenied testimony of Barwise, Cantrell said that Barwise was laid off. When Barwise asked for a reason, Cantrell replied that Barwise had not been doing his job, that he was placing enough advertising in the outlets that he served, and that his sales were off sharply. Barwise asked if Cantrell were sure that it was not because of the "union" to which Cantrell replied that he knew nothing about the "union." I find that Barwise thus had reference to the Teamsters and

that Cantrell so understood him. According to Cantrell, route supervisors reported to him on several occasions that Barwise was not doing a satisfactory job and recommended his discharge on at least three of them. Route Supervisor Meyers testified that Barwise was a weak salesman, that he had recommended his replacement on a number of occasions but that he was not consulted on the day when the discharge was determined upon. Route Supervisor Larry Haynes, who after October 1962 had Barwise under his direct supervision, testified that Barwise had a "defeatist" attitude toward his job, that he was not successful in placing advertising material in the stores that he served, and that he recommended the dismissal of Barwise to Millard Tonkin and Cantrell several times. Hilton, as has been said, thought Barwise to be an "average" salesman. Haynes did not work in the week that Barwise was discharged and did not participate in the decision to take that action. Hilton, too, was absent that week. Meyers testified that after the meeting in San Francisco but before April 9, he discussed with the Tonkins, Cantrell, Haynes and Hilton the falloff in Barwise's sales and that some sort of decision was reached to terminate Barwise with, apparently, the date left open. This meeting, if it took place at all, must have occurred no later than April 5 for neither Hilton nor Haynes was at work the following week.

Harry Tonkin testified that at some time during the day of April 9, Cantrell or Millard Tonkin or both of them brought up the question of Barwise's tenure and that when he saw the posting of Barwise's sales totals for the month, about 65 percent of quota, he ordered that Barwise be discharged and he was.

When on April 9, Harry Tonkin saw the sales' totals for the route served by Barwise, he saw the result of 6 working days.[2] Clearly Barwise's sales were down and by a substantially greater percentage than those of any other route salesman. Barwise explained that he had overloaded his customers in late March in order to increase his sales totals during the first quarter bonus period with the result that sales opportunities in early April were lessened. Although I credit this testimony it seems not unlikely that other route salesmen had done the same thing and thus were in a comparable situation. However, it is the fact that Barwise's sales for the recently closed quarter had exceeded quota. If, as the Tonkins, Cantrell and Meyers testified, Barwise had demonstrated himself to be a weak salesman his better showing in that period should have been encouraging and perhaps have caused some one or all of them to hope that he was developing into a more desirable employee. Seemingly in disregard of the creditable showing so recently made and with attention fixed upon the low sales in the first 6 working days in April, Harry Tonkin ordered the discharge. Barwise was given no opportunity to explain, if he could, why his sales had dropped. Cantrell testified that Barwise's route was taken over by a route supervisor for a week or two until another man could be permanently assigned to it. Although Meyers did not say so in his testimony, he was the only route supervisor available to the Respondent that week. Haynes had been injured in a traffic mishap and Hilton was on vacation. So the Respondent was ill prepared to withstand the loss of a route salesman at that time. Viewing the circumstances of the dis-

[2]April 1 through 5 and April 6.

charge in the light of Barwise's known advocacy of the Teamsters, recalling the Tonkins' opposition to dealing with any labor organization other than the Union, and considering that on April 8 the Respondent had been served with a charge alleging the commission of unfair labor practices, it seems highly probable that the Tonkins would attribute to Barwise some measure of responsibility for this last development.

I do not believe the testimony of the Tonkins and of Cantrell that the poor sales' performance of Barwise in the early days of April triggered his discharge. Barwise had been in Respondent's employ then for about 14 months. Even if it be true that he was the least desirable from the standpoint of profitability among Respondent's salesmen (some doubt is cast upon such an evaluation by the testimony of one-time Route Supervisor Hilton, a disinterested witness, that Barwise was an average salesman), he had nonetheless demonstrated improvement in the first quarter of 1963 and from the meager evidence afforded the Respondent by the sales' totals of 6 days, it could not reasonably have concluded that Barwise was a hopeless failure. Indeed, even if it so appeared to the Respondent, it seems highly unlikely that he would have been discharged in mid-week with no replacement available and with only one route supervisor at hand to act as a temporary substitute.

Weighing all the facets of the evidence bearing upon the question, I am convinced and find that Barwise was discharged because the Respondent was aware of his opposition to accepting the contract terms offered, knew of his advocacy of the Teamsters as a bargaining agency for Respondent's employees, learned of his solicitation of employees to designate the Teamsters resulting in

the filing of a representation petition by that organization, and to cap it all, read the assertion in the charge served on April 8 that the Respondent had committed unfair labor practices in its dealings with the Union. Barwise, as an officer of the Union and as a member of its negotiating committee, necessarily, in the circumstances, was viewed as one privy to the unfair labor practice charge. I find that the low sales made by Barwise in early April served as a pretext to accomplish a discharge actually motivated by the opposition of Barwise to acceptance of the contract and his activity in behalf of the Teamsters. I find that by the discharge of Barwise, the Respondent has discouraged activity in behalf of a labor organization and has thereby committed unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

Howard Hill, earlier identified in this Decision as the president of the Union, testified credibly and without contradiction that on April 24, the two Tonkins said that they were disturbed about the labor problem in their business and asked Hill if he knew of any way to reestablish "peace of mind on the job. . . ." Hill said that he would like to see this come about. One of the Tonkins asked if Hill knew who was responsible for the unfair labor practice charge and if Hill had been questioned by a representative of the Board in that connection. Hill said that he had been interviewed by such a representative and that the questioning had centered about the discharge of Barwise. Two days later, according to Hill, at a Union meeting, the employees voted not to abandon the unfair labor practice charge.

Donald Olson, whose employment with the Respondent as a route driver began about August 1962, was

discharged on May 17. Olson signed a Teamster designation card on April 1 at the solicitation of Barwise. On May 16, according to Olson, at a Union meeting on the question of supporting the unfair labor practice charge earlier filed, he indicated to those about him that he was a Teamster supporter. Hill placed this meeting on April 26 and did not indicate in his testimony that Olson took any noticeable part in it. On Friday, May 17, having injured his ankle, Olson returned to the plant before finishing his route. Learning that Cantrell wanted to see him, Olson, for some reason not clear from the record, left the plant and later in the day reached Cantrell by telephone. Cantrell told him that he was discharged and that he should return his uniforms on Monday. On Monday, Cantrell told Olson that some customers were dissatisfied with the service rendered by Olson and preferred that he no longer call on them. Olson said that the route was too long to permit it to be served as it should be.

There is much testimony in the record about Olson's shortcomings from which it appears that although at least a passable salesman, his personal appearance was poor and that he too often skipped stops that should have been made.[3] Cantrell asserted in his testimony that one reason for the discharge was the loss, due to Olson's misfeasance, of a bowling alley account. It is difficult to decide from Cantrell's confused testimony on this point whether Cantrell even knew of this development before the discharge was made. Cantrell also testified that two customers, a market and a lunchroom, asked that Olson no longer be permitted to serve them.

[3]It is at least possible that Olson's route covered more stops than could be made as scheduled.

As to the lunchroom, this appears to be a fabrication. I do not regard Cantrell as a reliable witness and I am convinced that he has not testified truthfully in respect to the lunchroom account. Nonetheless, I do not consider that there is a preponderance of evidence to sustain the allegation that the discharge of Olson was discriminatory. He was disposed to favor the Teamsters but there is little in this record to persuade that the Respondent thought him to be a strong supporter of the Teamsters or that he had so conspicuously demonstrated such a preference that this impression would have been conveyed to it. If, as Olson testified, the meeting at which the employees voted to support the unfair labor practices took place on May 16 instead of the earlier date on which Hill placed it, one is struck at the coincidence of his discharge following on the next day. But such a coincidence is significant only if at the meeting Olson so identified himself as one holding views repugnant to the Respondent as to make it likely that the Respondent learned of it. Hill said that there was little discussion at the meeting. Olson testified that he and some others indicated that they would vote to pursue the charges but of course that is what the whole group did and I find no reason for the Respondent to have concluded that Olson was in any sense a leader in the matter. I conclude that the evidence to support the allegation that Olson was discriminatorily discharged is insufficient. It will be recommended therefore that the complaint in this particular be dismissed.

There remains for disposition the question of the Respondent's alleged domination or interference in the administration of the Union. Except as indicated below, the factual allegations relied upon to support this conclusion have largely been established.

1. The Respondent has deducted dues from employees' earnings and remitted them to the Union.

2. James Elder, *now a supervisor,* was the Union's president until February 15.

3. The evidence does not establish that on March 29, the Respondent "instructed" the Union to call a meeting on premises owned or controlled by the Respondent.

4. The Respondent told employees that they must accept the contract offered if they desired to work.

5. The evidence does not establish that the Respondent told employees that they must form a new union if the Union did not accept the contract.

6. The contract executed on April 1 contains a union security clause.

7. The evidence does not establish that the Respondent "instructed" officials of the Union to intervene in the representation case.

8. The Respondent did, purporting to act in behalf of the Union, indicate that the Union desired to intervene in the representation case.

I find the evidence not to sustain the contention that Elder was a supervisor during any period when he was an officer of the Union. His authority seems at most to have been that exercised by a skilled workman in choosing a helper. There exists in this record then no evidence that before the events in late March or early April, the Respondent did anything which might be characterized as assistance to or domination of the Union within the Act's meaning. Although in late March, the Respondent was aware that the employees were

showing some interest in the Teamsters, no claim of representative status was made by that organization until April 2. Thus it appears that the Respondent was wholly free, at least until then, to deal with the Union and to reach whatever agreement with the Union that it could. Obviously it wanted to have a contract, albeit on its own terms, and to obtain this before whatever movement was afoot with the Teamsters could gain momentum.

As has been found, the April 1 contract was forced upon the Union and the employees by the commission of unfair labor practices. The Respondent argues that agreement was reached upon contract terms in the evening of March 29 so that on April 1 it did no more than require the Union to honor an earlier commitment. The evidence does not support the Respondent's position in this particular. No agreement was reached on March 29. Perhaps the Respondent on April 1 was free to put into effect the terms and conditions of employment to which it had offered to be bound. But it wanted more than that. It wanted a signed contract to demonstrate that the Union was the bargaining representative of the employees. It prevented work until this came about and said that if necessary to get a signed contract, other officers for the Union must be chosen. The Respondent was foresighted in this matter for on April 2 the Teamsters filed a representation petition. Now the Respondent was armed with a contract, and by reason of this circumstance, could advance the contention that the Teamster petition was untimely; it was obliged to continue recognition of the Union for the contract term. On April 6, the Respondent did forward a copy of the contract to the Board in its own

behalf and, without the Union's consent, set another copy pretending that it had come from the Union. It is obvious enough that the Union did not welcome these intrusions. It was forced into signing the contract and the submission of a copy to the Board was without its concurrence. By conditioning employment upon the signing of an agreement the Respondent placed the Union in a helpless situation and demonstrated that it would tolerate no union but one subservient to its demands. Having obtained the contract in this fashion, the Respondent then turned it to use to obstruct the bargaining claim of the Teamsters. The Respondent has thus unlawfully interfered with the Union's administration. I find that the Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

IV. The effect of the unfair labor practices upon commerce

The conduct of the Respondent set forth in Section III above, occurring in connection with its operations described in Section I above, above, has an intimate and substantial relation to trade, traffic and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and that it take affirmative action designed to effectuate the policies of the Act. As to William D. Barwise, it will be recom-

mended that the Respondent offer to him immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings suffered since his discharge on April 9 by payment to him of a sum of money equal to that which he normally would have earned since that date in his employment to the date of offer of reinstatement less his net earnings, if any, in other employment during that period. Backpay shall be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company,* 90 NLRB 289, and shall include interest at the rate of 6 percent per annum as in *Isis Plumbing and Heating Co.,* 138 NLRB 716.

Having found that the Respondent has unlawfully interfered in the administration of the Union and by the commission of unfair labor practices forced the signing of a bargaining agreement, substantial doubt exists whether, in the absence of such conduct, any contract would have resulted or if the Union would have survived. Such questions cannot be answered in a climate of coercion and must be deferred to a time when the unfair labor practices found herein are remedied. It will be recmommended therefore that the Respondent be ordered to withdraw and withhold recognition from the Union until such time as it may be certified by the Board and to cease giving effect to the April 1 contract. It will also be recommended that the Respondent be ordered to return with interest at the rate of 6 percent per annum all dues paid by employees to the Union on and since April 1, 1963, under the compulsion of the union security provisions of that contract.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters and the Union are labor organizations within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the tenure of employment of William D. Barwise to discourage activity in behalf of the Teamsters, and by locking out employees to force signing of the contract, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering in the administration of the Union, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

5. By the discharge, by the interference in the administration of the Union, and by withholding employment from employees in order to force signing of the April 1 contract, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The evidence does not establish by its preponderance that the discharge of Donald P. Olson was unlawfully motiviated.

RECOMMENDED ORDER

Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interfering in the administration of Sacramento 7-Up Employees' Union or any other labor organization of its employees.

(b) Discharging or otherwise discriminating in respect to the tenure of employment of William D. Barwise or any other employee for the purpose of encouraging adherence to the Union or discouraging activity in behalf of the Teamsters or any other labor organization.

(c) In any other mannter interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Sacramento 7-Up Employees' Union or any successor thereto as representative of its employees for the purpose of dealing in respect to grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work and cease giving effect to the April 1 contract or any supplement, extension, or renewal thereof with that organization unless or until Sacramento 7-Up Employees' Union is certified as bargaining representative by the National Labor Relations Board.

(b) Offer to William D. Barwise immediate and full reinstatement to his former or substantially equivalent

position and make him whole for any loss of earnings by reason of the discrimination against him in the manner and to the extent described in the section of this Decision entitled "The remedy."

(c) Reimburse all employees with interest for any amounts paid to the Sacramento 7-Up Employees' Union as dues or initiation fees on or since April 1.

(d) Post at its plant, in Sacramento, California, copies of the notice attached hereto as an "Appendix."[4] Copies of said notice to be furnished by the Regional Director for the Twentieth Region shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof and be maintained for a period of 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by any other material.

(e) Preserve and upon request make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records pertinent to a computation of the amounts of backpay due under the terms of this Recommended Order.

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[4]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

(f) Notify the Regional Director for the Twentieth Region in writing within 20 days from the date of this Recommended Order what steps have been taken in compliance.[5]

Dated:

WALLACE E. ROYSTER
Wallace E. Royster
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT interfere in the administration of SACRAMENTO 7-UP EMPLOYEES' UNION. We hereby withdraw recognition from SACRAMENTO 7-UP EMPLOYEES' UNION as the representative of any of our employees for the purpose in whole or in part of dealing with or discussing grievances, labor disputes, wages, rates

[5]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this order what steps the Respondent has taken to comply herewith."

of pay, hours of employment or conditions of work unless or until that organization has been certified as bargaining representative of our employees by the National Labor Relations Board.

WE WILL NOT give effect to the contract with SACRAMENTO 7-UP EMPLOYEES' UNION dated April 1, 1963, or any renewal, extension or supplement thereof.

WE WILL offer to WILLIAM D. BARWISE immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of pay resulting from his discharge.

WE WILL refund to all employees all monies that they have been required to pay as dues or initiation fees to SACRAMENTO 7-UP EMPLOYEES' UNION on and since April 1, 1963, with interest at the rate of 6 percent per annum.

WE WILL NOT by means of lockout or in any other manner interfere with, restrain or coerce our employees in the exercise of their rights to join or support CHAUFFEURS, TEAMSTERS & HELPERS LOCAL 150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, or any other labor organization, or to refrain from doing so except to the extent that such right may be affected by any contract

lawfully made in accordance with Section 8(a)(3) of the National Labor Relations Act which may require membership in a labor organization as a condition of employment.

Tonkin Corp. of California, d/b/a
Seven Up Bottling Co. of Sacramento
(Employer)

Dated..... By.....
(Representative)

.....
(Title)

NOTE: We will notify William D. Barwise if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 830 Market Street, San Francisco, California (Telephone No. - YUkon 6-3500, Ext. 3191), if they have any question concerning this notice or compliance with its provisions.

APPENDIX II.

Decision and Order.

United States of America, Before the National Labor Relations Board.

Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento and Edward J. Farrell, An Individual and Sacramento 7-Up Employees' Union, Party to the Contract. Case No. 20-CA-2657.

On February 18, 1964, Trial Examiner Wallace E. Royster issued his Trial Examiner's Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in his Decision attached hereto. He also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended dismissal thereof. Thereafter, the Respondent filed exceptions to his Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

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[1]In the absence of exception thereto, we adopt *pro forma* the Trial Examiner's conclusion that the evidence is insufficient to support the allegation that Olson was discriminatorily discharged, and his recommended dismissal of this allegation of the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order, the Order recommended by the Trial Examiner, and orders that the Respondent, Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the following modifications:

1. Substitute for paragraph 1(b) the following paragraph 1(b), and add a counterpart paragraph to the Appendix notice to be posted as the third paragraph of the notice:

> "Discharging or otherwise discriminating with respect to the tenure of employment of William D. Barwise or any other employee, or locking out employees to force the signing of a contract, for the purpose of encouraging adherence to the Union or discouraging activity in behalf of the Teamsters or any other labor organization."

2. Add to paragraph 2(c) between the words "interest" and "for" the words "at the rate of 6 percent per annum."

3. Add to paragraph 2(e) between the words "backpay" and "due" the words "and reimbursement of dues and initiation fees."

Dated, Washington, D.C. Jun 10, 1964.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
National Labor Relations Board

(Seal)

APPENDIX III.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, *Petitioner,* vs. Tonkin Corporation of California, doing business as Seven Up Company of Sacramento, *Respondent.* No. 19,714.

[November 10, 1965]

On Petition to Enforce an Order of the National Labor Relations Board

Before: BARNES and HAMLEY, Circuit Judges, and MATHES, Senior District Judge

MATHES, Senior District Judge:

The National Labor Relations Board petitions to enforce its order of June 10, 1964, entered after hearing upon a complaint alleging violation by respondent, Seven Up Company of Sacramento, of §§8(a)(1), (2) and (3) of the National Labor Relations Act. [29 U.S.C. §§158(a)(1), (2) and (3).]

This order directs respondent to "Withdraw and withhold all recognition from Sacramento 7-Up Employees' Union or any successor hereto as representative of its employees"; and to cease giving effect to the April 1, 1963, contract between respondent and that union, "unless or until Sacramento 7-Up Employees' Union is certified as bargaining representative by the National Labor Relations Board". The order also directs respondent to reinstate an employee, one Barwise, and "make him whole for any loss of earnings by reason of the discrimination against him".

The basic issues presented by the petition are: (1) whether the hearing record establishes that respondent refused on April 1, 1963, to allow employees to work until after a new collective-bargaining agreement between respondent and the union had been signed; (2) whether this alleged "lockout" constituted an unfair labor practice; and (3) whether there is substantial evidence to support the finding that respondent violated §§8(a)(1) and (3) of the Act in discharging employee Barwise.

As to the alleged "lockout", respondent contends that in fact there was none; and, moreover, even if respondent's conduct amounted to a "lockout", this was protected activity under the holding in *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965).

Without deciding whether respondent in fact locked out its employees as alleged, we note at the outset that the order sought to be enforced was issued before *American Ship* was decided, and at a time when the Board held the view that, absent special circumstances not present here, a "lockout" for the purpose of exerting economic pressure to secure more favorable contract terms, after a bargaining impasse had been reached, was an unfair labor practice within the meaning of §§8(a)(1), (3) and (5) of the Act. [*Quaker State Oil Refining Corp.*, 121 N.L.R.B. 34, 337 (1958); and see, *e.g.*, *Utah Plumbing & Heating Contractors Assn.*, 126 N.L.R.B. 973 (1960); and *American Brake Shoe Co.*, 116 N.L.R.B. 820 (1956).]

In *American Ship*, the Court decided that it was not unfair labor practice, within the meaning of §§8(a)-(1) and (3), for an employer temporarily to lock out his employees with the sole object of applying economic

pressure to support a legitimate bargaining position, after an impasse in collective-bargaining negotiations had been reached. And the Court specifically stated: "This is the only issue before us, and all that we decide." [*American Ship Building Co. v. N.L.R.B., supra,* 380 U.S. at 308.]

The record at bar discloses evidence that respondent was inhospitable to any prospect of the Teamsters' Union becoming bargaining representative of its employees in lieu of the 7-Up Employees' Union. The record also discloses evidence of side-line proselytizing efforts on the part of the Teamsters' Union, which were intimately interlaced with the events of April 1 and the earlier company-union contract negotiations. The presence of union-representation activity interspersing the collective bargaining process, viewed in the perspective of Board rulings prior to *American Ship,* leads us to the conclusion that the proceeding, insofar as it relates to the "lockout" complaint, should be remanded to the Board for reconsideration, and possibly further hearings if the Board be so advised. As the Court observed in *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 331 U.S. 416 (1947):

> "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration." [331 U.S. at 428; see *N.L.R.B. v. Brown & Sharpe Mfg. Co.,* 169 F.2d 331, 336 (1st Cir. 1948).]

Looking now to those portions of the Board's order directing the reinstatement and compensation of Bar-

wise, we find the evidence in conflict as to reasons for the discharge; and the record is by no means unequivocal in view of Barwise's less-than-satisfactory history of performance in the sales promotion of respondent's product. However, respondent's knowledge of Barwise's efforts on behalf of Teamster representation, coupled with the timing of the discharge, persuade us that the Board could reasonably have drawn the inference it did from the facts in evidence and all surrounding circumstances, notwithstanding the existence of justifiable grounds which, under other circumstances, might have permitted dismissal. [See *N.L.R.B. v. Texas Independent Oil Co.*, 232 F.2d 447 (9th Cir. 1956).] Accordingly, we hold that there is substantial evidence in the record as a whole to support the Board's finding of a violation of §§8(a)(1) and (3) of the Act in the discharge of Barwise. [*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).]

The order of the Board will be enforced insofar as it relates to the reinstatement and compensation of employee Barwise. The issues subsumed in the remaining ("lockout") portions of the order will be remanded to the Board for further consideration, and such proceedings as the Board may deem appropriate, in light of *American Ship Building Co. v. N.L.R.B., supra,* 380 U.S. 300.

———

APPENDIX IV.

Decree.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento, Respondent, No. 19714.

Before: Barnes and Hamley, Circuit Judges and Mathes, Senior District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of its order dated June 10, 1964, directed against Respondent, Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 13, 1965, and has considered the briefs and transcript of record filed in this cause. On November 10, 1965, the Court, being fully advised in the premises, handed down its decision wherein the said order of the Board was enforced in part, and remanded in part for further proceedings consistent with the opinion of the Court. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating with respect to the tenure of employment of William D. Barwise or any other employee for the purpose of encour-

aging adherence to Sacramento 7-Up Employees' Union or discouraging activity in behalf of the Teamsters or any other labor organization.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, (hereinafter called the Act).

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Offer to William D. Barwise immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of earnings by reason of the discrimination against him in the manner and to the extent described in the section of the Trial Examiner's Decision entitled "The remedy."

(b) Post at its plant, in Sacramento, California, copies of the notice attached hereto as an "Appendix." Copies of said notice to be furnished by the Regional Director for the Twentieth Region, (San Francisco, California), shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof and be maintained for a period of 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by any other material.

(c) Preserve and upon request make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records pertinent to a computation of the amounts of backpay due under the terms of this Decree.

(d) Notify the said Regional Director in writing within 10 days from the date of this Decree what steps the Respondent has taken to comply herewith.

Enforced, Decree Filed and Entered

/s/ Frank H. Schmid
Frank H. Schmid
Clerk

A True Copy
Attest: Frank H. Schmid Clerk.

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO

A Decree of the United States Court of Appeals enforcing in part and remanding in part an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL offer to WILLIAM D. BARWISE immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of pay resulting from his discharge.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights to join or support CHAUFFEURS, TEAMSTERS & HELPERS LOCAL 150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, or

any other labor organization, or to refrain from doing so except to the extent that such right may be affected by any contract lawfully made in accordance with Section 8(a)(3) of the National Labor Relations Act which may require membership in a labor organization as a condition of employment.

Tonkin Corp. of California, d/b/a
Seven Up Bottling Co., of Sacramento
(Employer)

Dated ..... By .....
(Representative) (Title)

NOTE: We will notify William D. Barwise if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 13050 Federal Building, 450 Golden Gate Ave., Box 36047 San Francisco, California, (Telephone No. 556-3197), if they have any question concerning this notice or compliance with its provisions.

———

APPENDIX V.

Supplemental Decision and Order.

United States of America, Before the National Labor Relations Board

Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento and Edward J. Farrell, An Individual and Sacramento 7-Up Employees' Union Party to the Contract. Case No. 20-CA-2657.

On June 10, 1964, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices and ordering that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the National Labor Relations Act. On November 10, 1965, the United States Court of Appeals for the Ninth Circuit issued a decision,[2] enforcing the order of the Board insofar as it relates to the reinstatement and compensation of employee Barwise, but remanding the issues subsumed in the remaining "lockout" portions of the order to the Board for further consideration, and such proceedings as the Board may deem appropriate, in the light of *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, decided by the United States Supreme Court subsequent to the Board's Decision and Order herein.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in

[1] 147 NLRB 401.
[2] 352 F. 2d 509.

connection with its reconsideration of this case to a three-member panel.

As stated by the Court of Appeals, in *American Ship* the Supreme Court held that it was not an unfair labor practice, within the meaning of Section 8(a)(1) or (3) of the Act, for an employer temporarily to lock out his employees with the sole object of applying economic pressure to support a legitimate bargaining position, after an impasse in collective-bargaining negotiations had been reached; and the Supreme Court specifically stated: "This is the only issue before us, and all that we decide." We note also that the Supreme Court in *American Ship* emphasized, in finding that the lockout did not violate Section 8(a)(1), that there was no basis for finding that the lockout was unlawfully motivated either to destroy or frustrate the process of collective bargaining or to destroy the union's capacity for effective and responsible representation; and then emphasized, in finding that the lockout did not violate Section 8(a)(3), that there was no evidence or finding that the employer was activated by a desire to discourage membership in the union as distinguished from a desire simply to affect the outcome of the particular negotiations in which he was involved.

The essential facts in the case herein are as follows:

For a number of years, the Respondent has been a party to a series of collective-bargaining agreements with the Sacramento 7-Up Employees' Union covering the Respondent's nonsupervisory employees. Under these contracts, the Respondent's employees, who comprise the entire membership, are required to be members of the Union as a condition of employment, and

the Respondent checks off their monthly dues. Meetings of the Union have been irregular and infrequent and have been largely social.

In March 1963, the parties began negotiations for a new contract and held several meetings. On March 27, 4 days before the old contract was to expire, the employees rejected the Respondent's most recent offer, and on Friday evening, March 29, Respondent President Harry Tonkin held a meeting of all employees to discuss the contract. Tonkin told the men that they could not go to work on Monday morning unless the contract was signed and that he wanted a contract so that they could go to work in harmony. Tonkin added that any employees not wishing to work under the Respondent's contract could "do what they want". He also added that he knew that the Teamsters had approached some of the employees and that he did not want to negotiate with the Teamsters, that he wanted to continue to do business with the Union rather than the Teamsters.

After Tonkin left, the employees discussed the Respondent's proposal, but not enough men remained at the meeting to take another vote. Later that evening, a small group of employees, including Howard Hill, the Union's president, and William Barwise, its secretary, went to the Respondent's office to confer with Harry Tonkin and his brother Millard, the Respondent's vice president. Hill said that in discussing contract matters he could make no final commitment, because any agreement would be subject to ratification by the Union membership. The employees asked for concessions on such items as holidays, a bonus plan, sick leave, and health and welfare, but Tonkin either rejected the re-

quests or merely replied that the Respondent would do the best it could in the future, and refused to incorporate any of these matters into the written contract.[3] The Tonkin brothers offered to match any higher rate paid by the local Pepsi-Cola bottling concern. The employees present expressed satisfaction with this point and the meeting broke up. The next day, Saturday, Millard Tonkin called the manager of the Pepsi-Cola concern to ask about their wage rate, but learned that Pepsi-Cola was deadlocked over wages. Tonkin then called Bernal Williams, an employee who had been at the meeting, and reported this development to Williams.

On Sunday, March 31, Hill, Barwise, and Williams, at Barwise's suggestion, met with some Pepsi-Cola employees and a Teamsters representative. Barwise signed a Teamsters card himself and during that afternoon and the next morning solicited other Respondent employees on behalf of the Teamsters. By Monday morning he and Hill had submitted nine cards to the Teamsters from among the Respondent's 17 employees.

On Monday morning, April 1, the Respondent's employees found the gate to the truck yard locked. When all the employees reported for work, Harry Tonkin assembled them in the plant office and announced that no one could go to work until the contract was signed. Tonkin told the men, "We have this contract and if any of the Union officials don't want to go to work we will have a new election and get new plant union officials." Tonkin also observed that if the men did not want to work, the Respondent had no lack of job applicants.

[3]At this meeting or sometime later Tonkin orally agreed to one additional holiday, but he refused to incorporate this into the written contract.

During the course of the meeting, the employees twice withdrew to vote on the Respondent's proposal and twice rejected it. Following the second vote, however, the men began to wander back into the plant. Later that morning, Hill and Barwise, who had been the last to go back into the plant, signed the contract without formal approval of the membership. While they were signing the contract, one of the Tonkin brothers said that the Respondent would find out who had solicited cards for the Teamsters, and Barwise admitted that he had done so.

On April 2, the Teamsters filed with the Board's Regional Office a petition for a representation election among the Respondent's employees. The Regional Office then wrote the Respondent and the Union notifying them of the petition and asking if any collective-bargaining agreement was in effect. The Union was advised that if it claimed any interest in the proceeding, it should reply by April 8, 1963, forwarding two copies of any contracts it had with the Respondent, and that if it did not reply the Board would assume that it had no interest. On April 5, the Tonkin brothers summoned Hill and Barwise to the Respondent's office and questioned them about the letters from the Board. Hill explained that the Teamsters petition had been filed as a result of the cards which he and Barwise had solicited. The Tonkin brothers offered to make a copy of the contract for the Union to submit, but Hill said that he had not decided whether to reply. The next day Hill and Barwise advised Millard Tonkin that the Company could do as it wished, but the Union was not "going to do anything about it in any manner whatsoever." Thereupon, Millard Tonkin mailed a copy of the con-

tract to the Board on behalf of the Respondent and another copy on behalf of the Union. The latter was in an envelope bearing the Union's return address, with a letter of transmittal reading:

> The enclosed contracts are sent as requested by the NLRB
>
> 7-Up Employees Union of Sacramento

On Monday, April 8, the Respondent received a copy of the unfair labor practice charge here, which had been filed on behalf of the Union by its counsel, alleging, *inter alia,* that the Respondent had effectively denied its employees their right to bargain through representatives by its "interference, restraint and coercion". The next day the Respondent discharged Barwise.

In our original Decision herein, we found that the Respondent locked out its employees to force immediate acceptance of *Respondent's* new contract terms by the incumbent Sacramento 7-Up Employees' Union, and then used this new contract to obstruct the representation petition filed by the rival Teamsters with the Board, all for the purpose of keeping the incumbent Union subservient to it as a bargaining representative and preventing the rival Teamsters from becoming the bargaining representative. Accordingly, we found that Respondent had thus unlawfully interfered with the incumbent Union's administration in violation of Section 8(a)(2) of the Act.

It is also apparent, and we find, that Respondent's use of the lockout, as an integral part of its entire course of unlawful conduct, was designed to destroy or frustrate the process of collective bargaining by preventing a free choice of a bargaining representative by the

employees, and rendering the incumbent Union incapable of effective and responsible representation; and was also designed to encourage membership in the incumbent Union and discourage membership in the Teamsters.[4] Thus, unlike *American Ship,* where the *sole* object of the lockout was to apply economic pressure to support a *legitimate* bargaining position after a bargaining impasse had been reached, the lockout here was motivated by purposes repugnant not only to Section 8(a)(2) but also to Section 8(a)(1) and (3).[5] Such a lockout is the very antithesis of one solely in support of a legitimate bargaining position. Accordingly, upon reconsideration, we reaffirm our original findings that the Respondent's lockout of its employees violated Section 8(a)(1) and (3),[6] and that the lockout and subsequent conduct flowing therefrom violated Section 8(a)(2); and we reaffirm our orignal Order herein.

Dated, Washington, D.C. May 27, 1966.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
National Labor Relations Board

(Seal)

---

[4]There is additional evidence of such unlawful motivation in our finding, affirmed by the Court of Appeals, that a week after the lockout Respondent discharged employee Barwise because of his opposition to acceptance of Respondent's contract and his activity in behalf of the Teamsters, in violation of Section 8(a)-(1) and (3).

[5]We thus find it unnecessary to reach questions concerning the existence of an impasse.

[6]See *American Stores Packing Co., et al.,* 158 NLRB No. 46. Cf. *Weyerhauser Company, et al.,* 155 NLRB No. 82.

APPENDIX VI.

[Opinion of the United States Court of Appeals for the Ninth Circuit is printed and appended to Petition as Appendix "A"].

APPENDIX VII.

Decree.

United States Court of Appeals for the Ninth Circuit.

Tonkin Corporation of California, d/b/a Seven-Up Bottling Company of Sacramento, Petitioner, v. National Labor Relations Board, Respondent. No. 21,130.

Filed April 29, 1968.

Before: Chambers and Hamley, Circuit Judges; and Wollenberg, District Judge.

THIS CAUSE came on to be heard upon a petition to review a supplemental order of the National Labor Relations Board, dated May 27, 1966, against the above named petitioner, its officers, agents, successors, and assigns, and upon the Board's cross-petition for enforcement of said order. The Court heard argument of respective counsel on December 13, 1967, and has considered the briefs and transcript of record filed in this cause. On March 29, 1968, the Court, being fully advised in the premises handed down its opinion denying the petition for review and granting full enforcement of the Board's supplemental order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court that Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interfering in the administration of Sacramento 7-Up Employees' Union or any other labor organization of its employees.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Sacramento 7-Up Employees' Union or any successor thereto as representative of its employees for the purpose of dealing in respect to grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work and cease giving effect to the April 1, 1963 contract or any supplement, extension, or renewal thereof with that organization unless or until Sacramento 7-Up Employees' Union is certified as bargaining representative by the National Labor Relations Board.

(b) Locking out employees to enforce the signing of a contract, for the purpose of encouraging adherence to the Union or discouraging activity in behalf of the Teamsters or any other labor organization,

(c) Reimburse all employees with interest at the rate of 6 per annum, for any amounts paid to the Sacramento 7-Up Employees' Union as dues or initiation fees on or since April 1, 1963.

(d) Post at its plant, in Sacramento, California, copies of the notice attached hereto as an "Appendix." Copies of said notice to be furnished by the Regional Director for the Twentieth Region (San Francisco, California), shall, after being duly signed by the Petitioner, be posted immediately upon receipt thereof and be maintained for a period of 60 consecutive days thereafter in conspicuous places where notices are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Preserve and upon request make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records pertinent to a computation of the reimbursement of dues and initiation fees due under the terms of this Decree.

(f) Notify the said Regional Director, in writing, within 10 days from the date of this Decree what steps the Petitioner has taken to comply herewith.

Endorsed, Decree Filed and Entered

/s/ William B. Luck
William B. Luck

A True Copy
Attest: William B. Luck, Clerk.

APPENDIX VIII.

Filed May 14, 1968.

In the United States Court of Appeals, for the Ninth Circuit.

Tonkin Corporation of California, dba Seven-Up Bottling Company of Sacramento, Petitioner, vs. National Labor Relations Board, Respondent. Case No. 21130.

Before: Chambers and Hamley, Circuit Judges: and Wollenberg, District Judge

Upon full consideration of Petition for Rehearing herein, this Court is of the opinion that nothing therein raises any issue not considered in the opinion of this Court filed March 29, 1968.

Therefore Petition for Rehearing is DENIED.

/s/ FREDERICK G. HAMLEY
United States Circuit Judge

/s/ ALBERT C. WOLLENBERG
United States Circuit Judge

/s/ RICHARD W. CHAMBERS
United States District Judge

APPENDIX IX.

Order Staying Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

Tonkin Corporation of California, dba Seven-Up Bottling Company of Sacramento, Petitioner, vs. National Labor Relations Board, Respondent. No. 21,130.

Filed: June 17, 1960.

Upon application of Morton B. Jackson counsel for the petitioner, and good cause therefor appearing, It is Ordered that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the petitioner herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before July 14, 1968. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Richard H. Chambers
United States Circuit Judge.

We will prepare a certiorari record when directed to do so.

Dated: San Francisco, Calif. June 13, 1968.

SUPREME COURT, U. S.

FILED

JUL 29 1968

JOHN F. DAVIS, CLERK

No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1968

TONKIN CORP. OF CALIFORNIA D/B/A SEVEN-UP BOTTLING CO. OF SACRAMENTO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ELLIOTT MOORE,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 8(a)(1) 6

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Section 8(a)(3) 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 234

TONKIN CORP. OF CALIFORNIA D/B/A SEVEN-UP BOTTLING CO. OF SACRAMENTO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The Board's initial decision and order (R. 15–25, 71–72) [1] are reported at 147 NLRB 401. The opinion of the court of appeals, enforcing the Board's order in part and remanding the case to the Board for reconsideration, is reported at 352 F. 2d 509.

The Board's supplemental decision and order (App. *infra*) are reported at 158 NLRB 1223. The opinion

[1] "R." references are to the materials contained in Volume I of the record in the court of appeals; "Tr." references are to the transcript of testimony in Volume II of the record; "G.C. Exh." refers to the General Counsel's exhibits, "P. Exh." to the petitioner's exhibits.

of the court of appeals following remand (Pet. App. 1–9) is reported at 392 F. 2d 141.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1968, and a petition for rehearing was denied on May 14, 1968. The petition for a writ of certiorari was filed on June 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's finding that the Company locked out its employees to coerce them in their choice of a bargaining representative is supported by substantial evidence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

For a number of years the employees of the Company have been represented by the Sacramento Seven-Up Employees' Union (the "Independent"). They comprise the Independent's entire membership and are required to belong as a condition of employment (R. 16; Tr. 46–47, 131–132, 406–407, G.C. Exh. 2, p. 6). The Independent, which was initially established in order "to keep the Teamsters out" (Tr. 422), has

no office (Tr. 412), keeps sporadic records (Tr. 412, 420), and has never processed a grievance (Tr. 419, 413). Its infrequent meetings have been primarily social (R. 16; Tr. 125–127, 116–120, 9, 85, 403, 412–413, 418–422).

In March 1963, the Independent and the Company began negotiations for a new contract. After the employees had rejected the Company's proposals, Company President Harry Tonkin called a meeting of all employees on Friday evening, March 29 (two days before the existing contract was to expire), and told them that they could not go to work on Monday morning unless the contract was signed (R. 17; Tr. 15–19, 160, 76–77, 25–26, 107–108, 258). He added that the Company would find new men to take the place of those who did not want to work (Tr. 160, 107). Tonkin further stated that he knew that some of the employees had been approached by the Teamsters and asserted that he did not want to negotiate with the Teamsters (R. 17; Tr. 20–22; 76, 155–160, 271–272).

After Tonkin left, the employees discussed the Company's contract proposal, but not enough men remained at the meeting to take a vote (R. 16; Tr. 23–25, 99–102, 340, 334). Later that evening, a small group of employees, including Independent president, Howard Hill, and secretary-treasurer, William Barwise, went to the Company's office to confer with Harry Tonkin and his brother Millard, the Company's vice president (*ibid.*). Hill said that he could make no final commitment on contract matters, because any agreement would be subject to ratification by the union membership (Tr. 101–102, 262). Tonkin either

rejected the employees' requests for concessions on holidays, a bonus plan, sick leave, and health and welfare, or replied that the Company would do the best it could, but he refused to incorporate any of these matters into the written contract (Tr. 100–101, 108–109, 62–65). The employees expressed satisfaction with the Company's offer to match the wage rate paid by the local Pepsi-Cola bottling concern, and they left with the understanding that Tonkin would call the Pepsi-Cola concern to ask about ~~their~~ its wage rate (Tr. 82–83). On Saturday, Millard Tonkin learned that Pepsi-Cola was also deadlocked over wages, and he reported that information to Bernal Williams, an employee who had been at the meeting (Tr. 299).

On Sunday, March 31, Hill, Barwise, and Williams met with some Pepsi-Cola employees and a Teamsters representative (R. 17; Tr. 26–27). Barwise signed a Teamster card himself, and solicited other Company employees on behalf of the Teamsters (R. 17; Tr. 26–28). By Monday morning, he and Hill had submitted to the Teamsters bargaining authorization cards from 9 of the Company's 17 employees (*ibid.*).

When the employees reported for work on Monday morning, April 1, they found the gate to the truck-yard locked (R. 17; Tr. 29, 129, 141, 162, 337). Harry Tonkin assembled them in the plant office and announced that no one could go to work until the contract was signed (R. 17; Tr. 163–164). He observed that if the men did not want to work, the Company had no lack of job applicants (*ibid.*). Tonkin told the employees, "We have this contract and if any of the Union officials don't want to go to work, we will

have a new election and get new plant union officials" (R. 17; Tr. 163–164, 131). He added that he knew some of the employees had been approached by the Teamsters and questioned why the men wanted to be "dominated" by that union (Tr. 30). The employees twice withdrew to vote on the Company's proposal and twice rejected it (R. 17; Tr. 31–36, 162–163). Following the second vote, however, the men began to wander back into the plant. Later that morning, Hill and Barwise signed the contract without formal approval of the membership (*ibid.*). When one of the Tonkin brothers said that the Company would find out who had solicited cards for the Teamsters, Barwise admitted that he had done so (R. 17; Tr. 35–36).

On April 2, the Teamsters filed a petition for a representation election among the Company's employees (R. 18; G.C. Exh. 3a). The Board's regional office wrote to the Company and the Independent, notifying them of the petition and asking if any collective-bargaining agreement was in effect (R. 18; Tr. 69–71, P. Exh. 2). The Independent was advised that it should reply by April 8, 1963, forwarding two copies of any contracts it had with the Company, and that if it did not reply, the Board would assume that it had no interest in the proceeding (R. 18; P. Exh. 2). The Tonkins summoned Hill and Barwise to the Company's office on April 5 to question them about the letters from the Board, and Hill explained that the Teamsters' petition had been filed as a result of the cards which he and Barwise had solicited (R. 18; Tr. 36–40, 110–111, 137). The Tonkins offered to make a copy of the contract for the Independent,

but Hill said that he had not decided whether to reply (R. 18; Tr. 38). The next day, Hill and Barwise advised Millard Tonkin that the Company could do as it wished, but the Independent was not "going to do anything about it in any manner whatsoever" (R. 18; Tr. 39–40, 110–111). Millard Tonkin thereupon mailed a copy of the contract to the Board on behalf of the Company and another copy on behalf of the Independent (R. 18; Tr. 318–319, 324). The latter was mailed in an envelope bearing the Independent's return address, and was accompanied by a letter of transmittal reading:

> The enclosed contracts are sent as requested by the NLRB.
> 7-Up Employees Union of Sacramento.

The original unfair labor practice charge was filed on April 5. On April 9, the day after the Company received a copy of the charge, it discharged Barwise, allegedly for failure to keep up his sales (R. 18; Tr. 41, 48, 286–287).

B. THE DECISIONS BELOW

In its initial decision, the Board found that the Company violated Section 8(a) (1), (2), and (3) of the Act by locking out its employees and otherwise interfering with the employees' choice of bargaining representative. The Board ordered the Company to cease and desist from the violations found, to withdraw recognition from the Independent unless and until it is certified as bargaining representative by the Board, to reimburse the employees with interest for dues checked off under the April 1 contract, and

to post appropriate notices (R. 23–24, 72). The Board also found that the Company's discharge of Barwise was discriminatorily motivated, in violation of Section 8(a)(3) of the Act, and ordered his reinstatement.

The court of appeals enforced the Board's order as to the reinstatement of Barwise, but with respect to the other violations, the court remanded the case to the Board to reassess the legality of the lockout in light of this Court's intervening decision in *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300. *National Labor Relations Board* v. *Tonkin Corp.,* 352 F. 2d 509.

On remand, the Board reaffirmed its initial decision and order. The Board found that the purpose of the lockout here, unlike *American Ship Building,* was to prevent the Company's employees from having a free choice in selecting their bargaining representative (App., *infra,* pp. 16–17).

Following the remand, the court of appeals held that the Board's findings were supported by substantial evidence, and enforced the Board's order in full (Pet. App. 1–9).

ARGUMENT

In *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300, 308, this Court upheld the legality of a lockout employed "solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached," but distinguished, as unaffected by that holding, "cases where the Board has concluded on the

basis of substantial evidence that the employer has used a lockout as a means to injure a labor organization or to evade his duty to bargain collectively."

Petitioner contends that the sole purpose of its lockout was to bring economic pressure on the Independent to sign the contract. The Board found, however, and the court of appeals agreed (Pet. App. 9), that the lockout was an "integral part" of the Company's effort to "frustrate the process of collective bargaining by preventing a free choice of a bargaining representative by the employees, and rendering the incumbent Union incapable of effective and responsible representation; and was also designed to encourage membership in the incumbent Union and discourage membership in the Teamsters" (App., *infra*, pp. 16–17). Accordingly, the sole question presented is whether substantial evidence supports the Board's finding that the lockout was illegally motivated. There is no occasion for further review of this factual issue. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the Board's finding is amply supported. On March 29, when Company President Tonkin first announced that employees would not be allowed to work the following Monday without a contract, he adverted to the Teamsters' campaign and asserted that he did not want to negotiate with the Teamsters. He again referred to the Teamsters' campaign when he spoke to the locked-out employees on Monday, and questioned his employees' desire to be "dominated" by that union. In addition, after reasserting that the employees could not work without a

contract, Tonkin threatened that "if any of the Union officials don't want to go to work, we will have a new election and get new plant union officials." After these tactics secured a new contract with the Independent, Millard Tonkin tendered the contract, on behalf of the Independent, as a bar to the Teamsters' election petition.[2] And when the Teamsters filed an unfair labor practice charge attacking the Company's conduct in securing the contract, the Company discharged Barwise because of his activities in support of the Teamsters. In these circumstances, the Board reasonably concluded that the lockout was prompted by a purpose to impede the employees' freedom of choice in the selection of a bargaining representative.[3]

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[2] Under the Board's contract-bar rule, an election petition will not be entertained for the duration of a collective-bargaining agreement covering the unit or for three years from its execution, whichever is less. *General Cable Corp.*, 139 NLRB 1123.

[3] Petitioner's reliance on *National Labor Relations Board* v. *Swift & Co.*, 294 F. 2d 285 (C.A. 3) and related cases (Pet. 17), is misplaced. The question here is not whether it is permissible for an employer to enter into, or insist upon, an agreement with an incumbent union where a rival union may be claiming to represent the employees. More than that was involved here for, as the Board found on the basis of the entire record, petitioner's purpose in locking out the employees was not merely to compel execution of the agreement but to coerce them in their choice of a bargaining representative.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ELLIOTT MOORE,
Attorney,
National Labor Relations Board.

JULY 1968.

APPENDIX

UNITED STATES OF AMERICA

Before the National Labor Relations Board

TONKIN CORP. OF CALIFORNIA, D/B/A SEVEN-UP BOTTLING CO. OF SACRAMENTO

and

EDWARD J. FARRELL, AN INDIVIDUAL

and

SACRAMENTO 7-UP EMPLOYEES' UNION

Party to the Contract

SUPPLEMENTAL DECISION AND ORDER

On June 10, 1964, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices and ordering that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the National Labor Relations Act. On November 10, 1965, the United States Court of Appeals for the Ninth Circuit issued a decision,[2] enforcing the order of the Board insofar as it relates to the reinstatement and compensation of employee Barwise, but remanding the issues subsumed in the remaining "lockout" portions of the order to the Board for further consideration, and

[1] 147 NLRB 401.

[2] 352 F. 2d 509.

such proceedings as the Board may deem appropriate, in the light of *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, decided by the United States Supreme Court subsequent to the Board's Decision and Order herein.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with its reconsideration of this case to a three-member panel.

As stated by the Court of Appeals, in *American Ship* the Supreme Court held that it was not an unfair labor practice, within the meaning of Section 8(a) (1) or (3) of the Act, for an employer temporarily to lock out his employees with the sole object of applying economic pressure to support a legitimate bargaining position, after an impasse in collective-bargaining negotiations had been reached; and the Supreme Court specifically stated: "This is the only issue before us, and all that we decide." We note also that the Supreme Court in *American Ship* emphasized, in finding that the lockout did not violate Section 8(a)(1), that there was no basis for finding that the lockout was unlawfully motivated either to destroy or frustrate the process of collective bargaining or to destroy the union's capacity for effective and responsible representation; and then emphasized, in finding that the lockout did not violate Section 8(a)(3), that there was no evidence or finding that the employer was activated by a desire to discourage membership in the union as distinguished from a desire simply to affect the outcome of the particular negotiations in which he was involved.

The essential facts in the case herein are as follows:

For a number of years, the Respondent has been a party to a series of collective-bargaining agreements

with the Sacramento 7-Up Employees' Union covering the Respondent's nonsupervisory employees. Under these contracts, the Respondent's employees, who comprise the entire membership, are required to be members of the Union as a condition of employment, and the Respondent checks off their monthly dues. Meetings of the Union have been irregular and infrequent and have been largely social.

In March 1963, the parties began negotiations for a new contract and held several meetings. On March 27, 4 days before the old contract was to expire, the employees rejected the Respondent's most recent offer, and on Friday evening, March 29, Respondent President Harry Tonkin held a meeting of all employees to discuss the contract. Tonkin told the men that they could not go to work on Monday morning unless the contract was signed and that he wanted a contract so that they could go to work in harmony. Tonkin added that any employees not wishing to work under the Respondent's contract could "do what they want". He also added that he knew that the Teamsters had approached some of the employees and that he did not want to negotiate with the Teamsters, that he wanted to continue to do business with the Union rather than the Teamsters.

After Tonkin left, the employees discussed the Respondent's proposal, but not enough men remained at the meeting to take another vote. Later that evening, a small group of employees, including Howard Hill, the Union's president, and William Barwise, its secretary, went to the Respondent's office to confer with Harry Tonkin and his brother Millard, the Respondent's vice president. Hill said that in discussing contract matters he could make no final commitment, because any agreement would be subject to ratification by the Union membership. The employees asked for

concessions on such items as holidays, a bonus plan, sick leave, and health and welfare, but Tonkin either rejected the requests or merely replied that the Respondent would do the best it could in the future, and refused to incorporate any of these matters into the written contract.[3] The Tonkin brothers offered to match any higher rate paid by the local Pepsi-Cola bottling concern. The employees present expressed satisfaction with this point and the meeting broke up. The next day, Saturday, Millard Tonkin called the manager of the Pepsi-Cola concern to ask about their wage rate, but learned that Pepsi-Cola was deadlocked over wages. Tonkin then called Bernal Williams, an employee who had been at the meeting, and reported this development to Williams.

On Sunday, March 31, Hill, Barwise, and Williams, at Barwise's suggestion, met with some Pepsi-Cola employees and a Teamsters representative. Barwise signed a Teamsters card himself and during that afternoon and the next morning solicited other Respondent employees on behalf of the Teamsters. By Monday morning he and Hill had submitted nine cards to the Teamsters from among the Respondent's 17 employees.

On Monday morning, April 1, the Respondent's employees found the gate to the truck yard locked. When all the employees reported for work, Harry Tonkin assembled them in the plant office and announced that no one could go to work until the contract was signed. Tonkin told the men, "We have this contract and if any of the Union officials don't want to go to work we will have a new election and get new plant union officials." Tonkin also observed that if the men did not want to work, the Respondent had

[3] At this meeting or sometime later Tonkin orally agreed to one additional holiday, but he refused to incorporate this into the written contract.

no lack of job applicants. During the course of the meeting, the employees twice withdrew to vote on the Respondent's proposal and twice rejected it. Following the second vote, however, the men began to wander back into the plant. Later that morning, Hill and Barwise, who had been the last to go back into the plant, signed the contract without formal approval of the membership. While they were signing the contract, one of the Tonkin brothers said that the Respondent would find out who had solicited cards for the Teamsters, and Barwise admitted that he had done so.

On April 2, the Teamsters filed with the Board's Regional Office a petition for a representation election among the Respondent's employees. The Regional Office then wrote the Respondent and the Union notifying them of the petition and asking if any collective-bargaining agreement was in effect. The Union was advised that if it claimed any interest in the proceeding, it should reply by April 8, 1963, forwarding two copies of any contracts it had with the Respondent, and that if it did not reply the Board would assume that it had no interest. On April 5, the Tonkin brothers summoned Hill and Barwise to the Respondent's office and questioned them about the letters from the Board. Hill explained that the Teamsters petition had been filed as a result of the cards which he and Barwise had solicited. The Tonkin brothers offered to make a copy of the contract for the Union to submit, but Hill said that he had not decided whether to reply. The next day Hill and Barwise advised Millard Tonkin that the Company could do as it wished, but the Union was not "going to do anything about it in any manner whatsoever". Thereupon, Millard Tonkin mailed a copy of the contract to the Board on behalf of the Respondent and another copy on behalf of the

Union. The latter was in an envelope bearing the Union's return address, with a letter of transmittal reading:

> The enclosed contracts are sent as requested by the NLRB
> 7-Up Employees Union of Sacramento

On Monday, April 8, the Respondent received a copy of the unfair labor practice charge here, which had been filed on behalf of the Union by its counsel, alleging, *inter alia,* that the Respondent had effectively denied its employees their right to bargain through representatives by its "interference, restraint and coercion". The next day the Respondent discharged Barwise.

In our originial Decision herein, we found that the Respondent locked out its employees to force immediate acceptance of *Respondents'* new contract terms by the incumbent Sacramento 7-Up Employees' Union, and then used this new contract to obstruct the representation petition filed by the rival Teamsters with the Board, all for the purpose of keeping the incumbent Union subservient to it as a bargaining representative and preventing the rival Teamsters from becoming the bargaining representative. Accordingly, we found that Respondent had thus unlawfully interfered with the incumbent Union's administration in violation of Section 8(a)(2) of the Act.

It is also apparent, and we find, that Respondent's use of the lockout, as an integral part of its entire course of unlawful conduct, was designed to destroy or frustrate the process of collective bargaining by preventing a free choice of a bargaining representative by the employees, and rendering the incumbent Union incapable of effective and responsible representation; and was also designed to encourage mem-

bership in the incumbent Union and discourage membership in the Teamsters.[4] Thus, unlike *American Ship*, where the *sole* object of the lockout was to apply economic pressure to support a *legitimate* bargaining position after a bargaining impasse had been reached, the lockout here was motivated by purposes repugnant not only to Section 8(a)(2) but also to Section 8(a)(1) and (3).[5] Such a lockout is the very antithesis of one solely in support of a legitimate bargaining position. Accordingly, upon reconsideration, we reaffirm our original findings that the Respondent's lockout of its employees violated Section 8(a)(1) and (3),[6] and that the lockout and subsequent conduct flowing therefrom violated Section 8(a)(2); and we reaffirm our original Order herein.

Dated, Washington, D.C.

[SEAL]

JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
HOWARD JENKINS, Jr., *Member.*
NATIONAL LABOR RELATIONS BOARD.

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[4] There is additional evidence of such unlawful motivation in our finding, affirmed by the Court of Appeals, that a week after the lockout Respondent discharged employee Barwise because of his opposition to acceptance of Respondent's contract and his activity in behalf of the Teamsters, in violation of Section 8(a)(1) and (3).

[5] We thus find it unnecessary to reach questions concerning the existence of an impasse.

[6] See *American Stores Packing Co., et al.*, 158 NLRB No. 46. Cf. *Weyerhauser Company, et al.*, 155 NLRB No. 82.

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IN THE

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October Term, 1968
No. 234

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Tonkin Corporation, dba Seven-Up Bottling Company of Sacramento, Petitioner herein, respectfully replies, pursuant to U.S. Sup. Ct. Rule 24(4) to Respondent's Brief in Opposition.

Statement in Reply.

Respondent's statement of the issue herein assumes the existence of a key element which, actually, is wholly absent from this case under the facts, established Board policy, and settled law; namely, a question of representation.

Moreover, it completely avoids and ignores the significant questions of law and the consequent uncertainty in national labor policy created by the Supple-

mental Decision of the Board and the Opinion of the Court below. These questions have been set forth in the Petition (Pet. pp. 3-4).[1]

In characteristic keeping with its method of formulating its statement of the issue, Respondent similarly distorts the factual picture by cutting and pasting from the record in order to conform the evidence to Respondent's preconceived view of what the case ought to be (as distinguished from what it actually is). By way of reply, we invite the Court simply to compare the statement of facts in the Opinion with that contained in Respondent's Brief in Opposition. Specifically, we would draw the Court's attention to some of the more startling examples of this synthetic "factualizing."

A. The Friday Meeting Between the Tonkins and the Membership.

1. Respondent makes no mention of the Tonkins' wage and overtime offers (Resp. Br. p. 3);

2. The Opinion states and the record abounds with evidence establishing that Harry Tonkin proposed a Three Dollar ($3.00) per week wage increase; offered to pay time and one-half overtime; promised to match any wage increase paid by other local soft drink companies; and discussed sick leave benefits, paid holidays and vacations, bonuses, and pension plans (Op. p. 2).

B. Subsequent Membership Meeting.

1. Respondent merely says that the employees discussed the company's contract proposal (Resp. Br. p. 3);

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[1] "Pet." refers to the Petition; "Resp. Br." refers to Respondent's Brief in Opposition thereto; "Op." refers to the Opinion of the Court below, found in Appendix "A" of the Petition.

2. The Court below found that "there was a general consensus to accept the proposals in view of the overtime and 'most favored nation' terms," and that "it was agreed that representatives would meet later with the company to relate the results of the meeting." (Op. p. 3). (The record clearly shows that the membership authorized their officers to accept the offer).

C. Subsequent Meeting Between Management and Union Negotiating Committee.

1. Respondent states that a small group of employees went to the company's office to confer with the Tonkins. Respondent then baldly asserts that the Tonkins either "rejected the employees' request for concessions on holidays, a bonus plan, sick leave, and health and welfare, or replied that the company would do the best it could, but refused to incorporate these into the written contract." (Resp. Br. pp. 3-4);

2. The record abundantly supports the facts that

(a) The "small group of employees" consisted of the Incumbent's officers, who comprised its negotiating committee;

(b) They informed management that the men had agreed to accept the wage increase and the proposal to pay overtime if the company would agree to match any further increases in wages of similar local industries (the "most favored nation" clause already offered);

(c) Tonkin agreed that a man's birthday would be considered a paid holiday;

(d) Tonkin also agreed that the men would not be docked when they were sick;

(e) Management agreed to look further into the bonus system and improve it, (a commitment, in fact, fulfilled.)

(f) It pointed out that it had voluntarily upgraded the disability plan the year before, and agreed to consider a pension plan when financially able.

Further, the Opinion emphasized that *agreement was reached,* pointing out that "When the meeting broke up, *the parties shook hands.* The independent informed management that they would have to submit *the agreement* for ratification to the full membership and that a meeting would be held Monday morning, April 1, for that purpose." (Emphasis added; Op. pp. 3 and 4).

D. Mailing of Contract to the Board on Behalf of Incumbent.

1. Respondent states that the Tonkins "summoned" Hill and Barwise "to question them about the letters from the Board . . ." and intimates that they coerced and dominated the Incumbent officers by sending a copy of the contract to the Board on behalf of the Incumbent;

2. The Opinion feels that the sending in of the contract "supports the Board's finding that Petitioner wanted to keep the Teamsters from representing his employees," (a desire, Petitioner submits, is not violative of the Act in this case).

In fact, however, Hill approached management after work on April 5, and the Opinion makes it clear that it was he who asked management if they had received

the letter from the Board and who stated that he had no means by which to make copies of the contract (Op. p. 5). Management offered to send in a copy for the incumbent if it desired, whereupon Hill sought advice from the Teamsters. Upon being told by them (with obvious and perhaps deliberate error) that it made no difference whether or not they sent a contract in, "Hill informed management that as far as the Union was concerned, management had *complete discretion* in either sending a copy for the Union or not." (Emphasis added; Op. p. 5).

E. The Formation of the Incumbent Union.

1. In its eagerness to tar Petitioner with the brush of Anti-Teamster bias, Respondent permits itself to take liberties with the limits of candor. It persists in declaring that the Incumbent was formed "to keep the Teamsters out", in an obvious attempt to link the Tonkins to that statement and attribute its implications to them. But Respondent does not advise the Court that the testimony upon which it bases this assertion establishes that this motivation was not that of the Tonkins, or even the *former* management, but was that of the employees who established the Incumbent many years before;

2. The facts are undisputed that the Incumbent "had been the bargaining representative for many years for Petitioner's plant employees and route salesmen. It was formed originally *by employees of Petitioner* in order (as one of the founding employees testified) to keep the Teamsters Union from gaining any representation." (Emphasis added; Op. pp. 1 and 2);

3. This original anti-Teamster motive is entirely irrelevant to the question of Petitioner's state of mind *vis a vis* the Teamsters:

(a) It is far too remote;

(b) It was the *employees,* not management, who desired to keep the Teamsters from gaining any representation;

(c) In any event, the management of the company at the time of the Incumbent's inception was wholly different from and unrelated to the Tonkins, who purchased the company barely a year before the events under review.

Any former anti-Teamster animus on the part of the employees, therefore, cannot factually, equitably or logically be attributed to the Tonkins, nor is it probative of their state of mind. Respondent's repeated implications to the contrary can only be interpreted as a deliberate attempt to mislead the Court.

Conclusion.

The evidence taken as a whole, and the proper view and perspective of this case raise questions of law and labor policy of such disturbing breadth and sweep as to compel their consideration by the Court.

Petitioner therefore urges that this Petition be granted.

Respectfully submitted,

HODGE, JACKSON, KUMLER & CROSKEY,

By MORTON B. JACKSON,

Attorneys for Petitioner.